No. 7.

Bailments

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Bailment.

(1.)

Definition: A delivery of goods, on a contract express or implied, that they shall be restored to bailor, or according to his directions, when the purpose for which &c. shall have been answered. Jones on B^t. 3. 48. 2 Bl. 451. Ex. A. delivers goods to B. to keep while A. is absent. Cloth delivered to a tailor to make into clothes &c. 1 Vern 258. 12 Mod. 482. Cro. El. 822.

Every bailment vests a qualified property in the bailee. Jon. 112. 1 Bac. 240-1. Ir + Stud^t. 129. Selv. 172. See 4 Co. 83. b + Co. L. 89. a. 3 Atk. 45. (Where a Farmee, as distinguished from other bailees, is said to have "a property" in the goods. But there is no such distinction.) Jone. 112. Selv. 172. Ir + Stud^t. 129. — (Farmee, it is true, has from the nature of the bailment, a higher interest than some other bailees; but all bailees have a special property in the goods). 7 T.R. 392 arg^t. 398. vid 3 Atk. 45. (2.) p. 105-7.

That a mere lawful poss.^n gives a special property, vid 7 T.R. 392 arg^t. 397-9. as in Ld. 505- finder. — A lawful poss.^n implies a right of poss.^n p. 105.

From bailee's obligation to restore the thing bailed, (at supra), it follows, that bailee must keep it according to the terms of the contract, & be responsible to bailor, if it be lost or damaged. Still however, as the bounds of justice would be transgressed, if bailee were in all cases made liable, at all events; it is a general rule, that he is not liable, if the loss &c happen without any fault in him. Jon. 8. 1 Bac. 236. — But to determine when he is in fault, the nature of the bailment, & the quality of the thing bailed, as well as his own conduct, are to be considered; — for different bailments require different degrees of care & diligence. Jon. 8. - To ascertain the requisite degree of diligence, in every case, is the principle (3.)

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object of enquiry under this title. Jon. 8.

General Rules, as to the degree of diligence, required, or Principle, of bailee, in different cases.

The most general rule is, that bailee, under a general acceptance, is bound to keep, or, as the case may be, use, the goods, with a degree of care, proportioned to the nature of the bailment. Jon. 8. In some cases, the degree will be greater, in some less, than ordinary diligence: For the degrees of care are various. Jon. 8.

(4.) Note: The acceptance is general, when there is no special agreement as to the degree of care to be used by bailee; so that the degree is left to be settled by the law: Special, when there is such an agreement, either extending, or qualifying, his liability.

Definition of different degrees of diligence & neglect:

Ordinary diligence is that, which rational men in general use in conducting their own affairs; or, in other words, that, which every rational man, of common prudence, uses in the management of his own concerns. Jon. 9-10. — The degrees of diligence each side of this standard, are not distinguished by any appropriate denominations. What exceeds it, is called more, what falls short of it, less, than ordinary diligence. Jon. 10.

(5.) To every degree of care or diligence, there is a corresponding degree of default, or neglect: Thus, the omission of ordinary care, is called "ordinary neglect". Jone. 11-13. 31. This is called, "lev is culpa".

The omission of that care, which very attentive & vigilant persons only take of their own goods, is less than ordinary neglect, — This is called slight neglect, or "levissima culpa". Jone. 13. 31.

The omission of that care, which even inattentive & thoughtless men take of their own goods, is greater than ordinary neglect; commonly called gross neglect, — "lata culpa" or "dolo proxima." Jon. 13. 30.

The last degree, viz gross neglect, is generally regarded as an evidence of fraud in bailee. L^d. Ray. 915. Jon. 13. 30. 34. — Not in all cases, however: Ex. If bailee suffers his own property of the same, or similar kind, to be lost by the same negligence by which bailors is lost. Jone. 35. — (P. 10 a 12). (6.)

In order to apply the general rule first laid down under this head (P. 3.) to particular cases, it is necessary to observe the three following rules: — I. If the baibment is for the benefit of the bailor only, nothing more than good faith is required of bailee, under a general acceptance. 1 Bon. C. 247. — He is liable, of course, for gross neglect only; or rather, for a violation of good faith.* Jon. 15-16. 21-2. 32. 51. 55. 64-5. 101-2. L^d. Ray. 915. ((*vide, 4 Co. 83. b, where it is holden obiter, that bailee must keep safely, at his peril. — But this is not law.)).

But the bailee may, by special agreement, extend his liability beyond the general rule. Jon. 22-3. 51-2. 66. L^d. Ray. 910. (Post "Deposit") (7.)

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III. When bailee only is benefitted, he is liable for slight neglect – i.e. he is bound to more than ordinary care. Jone. 15-16. 23. 33. 89. 90-1. (Post "Commodatum.")

IIII. When the bailment is a benefit to both parties, the "obligation changes in an even balance." Therefore bailee is bound to ordinary diligence only; & is liable for ordinary neglect. Jon. 14. 22-3. 32-3. 101. 165. (Post, "Locatum.")

The last 3 general rules (Jon. 33) hold, whenever the acceptance is general – i.e. when there is no special agreement altering the extent of bailee's liability.

(8.)

Kinds of Bailment.

Bailments, according to the com. law, are divided into 3 Kinds:
I. The first is called "depositum;" & is a delivery of goods, to be kept by bailee for bailor, without reward. L. Ray. 912-13. Jon. 50-1. 2. N. P. 172. – Called also naked bailment. 1 Bow. C. 247. & last author. 1 Bac. 243. Esp. 618. – The bailee, in this case is called the "depositary."

III. Bailment of the second kind, is called "commodatum;" & is a gratuitous loan of goods which are useful, to be used by the bailee, for his own benefit. L. Ray. 913-15. 1 Bow. C. 249. Bull. 72. Jon. 50. 89. 1 Bac. 243. – To be restored in specie. Esp. 619. Jone. 89. Sometimes called loan for use. The bailor is called the lender, the bailee, the borrower. The bailment may be called Lending & Borrowing.

(9.)

This second kind differs from a mutuum, which is also a loan, & generally gratuitous: But the latter is a loan for consumption, & to

be repaid in property of the same kind, but not in the same specific property: Ex. Loan of money, wine, corn, &c. In these the absolute property is transferred to the borrower, who, in case of a loss, must bear it, at all events. Jon. 89-90. 1 Bac. 241. Dr & Stud. 1. 29. A mutuum is, therefore, not a bailment.

IIII. "Locatio" & "Conductio" — i.e. a delivery of goods, to be used by bailee, for hire to be paid to bailor: The bailor is called "locator", & the bailee "conductor", or hirer. L. Ray. 913. Jon. 50. 119. 1 Bom. C. 251. Bul. 72. 1 Bac. 243. — Jones makes this a subdivision of his 3th kind, which he calls "locatum". Jon. 50: 119. — This I should call, in Engl. Letting & Hiring.

IV. Delivery of goods, as security for a debt, due from bailor to bailee. This is called a Pawn or pledge; in Latin "vadium", or "pignoi acceptum". The bailor is called Pawnor, & the bailee, Pawnee. L. Ray. 913. Jon. 50. 104. 1 Bac. 237. 243. Bull. 72. 1 Bom. C. 251. &c. Yelv. 178. Co. L. 205. 4 Com. 258. Esp 624. (10.)

V. Delivery of goods, to be carried, or for some act to be done about them, by bailee, for reward. L. Ray. 913, 917. 1 Bac. 243. Bull. 72-3. 1 Bom. C. 253. — Called in Latin, (when to be carried) "locatio operis mercium vehendarium". Jon. 50. 128. 144. — When some other act is to be done, "locatio operis faciendi". Jon. 50.

This 3th kind includes a delivery to a common carrier, or any one, who receives goods in the exercise of a public employment; & to a private carrier, or other private bailee. L. Ray. 913. 917-18. 1 Bom. C. 253. Bull. 72-3. (11.)

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Delivery to a private bailee, includes a delivery to one in a private professional character, as a tailor, or other mechanic. 1 Bac. 240. 344. — so to bailiffs, factors, &c.

VII. Delivery as in the 5th case; but the carrying, or other act is gratis. L. Ray. 913. Com. C. 264-5. Bull. 73. Cro. Jac. 224. Called "mandatum." L. Ray. 918. Com. 73. Bailee called "mandatary." Com. 74.

(12.) Rules as to the different kinds of Bailment, in their order.

II. Naked bailment, or deposit. In this case, the bailee is bound only to good faith; & liable, at most, only for gross neglect (Com. 32. 645. 101-2. 1 Com. C. 247. Ir. & Stud. 129. Bull. 72. 1 Atk. 158. Str. 1099. L. Ray. 909. 913): Such neglect being generally regarded as evidence of fraud. L. Ray. 918. 2 Atk. 452. Str. 581. Com. 13. 30. 64. — The reason of the rule is, that the bailment is advantageous to bailor only. 12 Mod. 487.

In some of the books it is said, that "ordinary" care will excuse (as if nothing less would) L. Ray. 913. 1 Com. C. 247. But the word, in these cases, appears to have been used without any distinctive meaning.

But he is not, in all cases, liable even for gross neglect. Indeed, he is not, (generally speaking) liable at all, for neglect, as such, & in the abstract; but for fraud only. If then, even gross neglect
(13.) does not furnish evidence of fraud, not liable: Ex. If he treats his own goods, of the same, or a similar kind, as to bulk & value, & c. with the same neglect. Com. 85-6. L. Ray. 914. 855. Str. 1099. 4 Burr. 2300.

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As if the depositary is a "careless, idle, drunken fellow," & leaves all his doors open &c (by Holt, L.d. Ray. 914-15. 1 Com. C. 248.

But these rules do not hold, when, by special agreement, he assumes a higher responsibility. He may thus make himself liable to any extent: For the general rule relates only to a general acceptance. (Jon. 88. L.d Ray. 738. 911-13. 3 Rep. H.C.L. 245-6. 394); i.e. to cases, in which there is no express agreement, as to the degree of care to be used, or as to the extent of his liability.

Another exception, according to Jones, is where the deposit is in consequence of the bailee's officiousness in offering to keep the goods (tho' the acceptance is general); for the owner is prevented, by this officiousness, from entrusting them to a person of approved vigilance. Jon. 87. - cites no authority. — Sed qu.

(14.)

The old opinions are contrary to the general rule (Co. L. 89. a. b. 4 Co. 83. b. Southcote's case — S.C. Cro. E. 815). Southcote's case was on a delivery of goods to defend.t to be kept by him "safely." He pleaded to the action of detinue, that the goods were stolen; & it was adjudged agt him. The decision in this case appears to be right: For the acceptance (as it appeared upon the record) was special, to keep "safely." Besides, the plea was ill, in not averring, that they were stolen without his default Jon. 80.

But the doctrine, advanced in Southcote's case, is, that a general acceptance obliges depositary to keep the goods "at his peril"; & that he is liable if they are stolen: - That an acceptance to "keep," & to "keep safely," is the same, & that, therefore, he keeps them at his peril, unless he accepts specially, to keep as he keeps his own goods. Cro. E. 815. 2 Roc. 230. 241. 4 Co. 83. b. cites. 1 Leon. 224. 1 Com. 103. Str. 141. 1 Rol. 338. Palm. 549-80. — But,

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This doctrine is expressly denied. L. Ray. 685. 911. n. 913-14. Jon. 59. Str. 1099. Com. R. 133. 135. Bull. 72.

Some too have taken a distinction between special agreements to keep, founded on a valuable consideration, & agreements not so founded. viz. That the latter is not binding as a contract. (1 Bac. 241) But this distinction is exploded. The delivery of the goods is a sufficient consideration. L. Ray. 909. 919. &c at sup. 4 & Stud. 129. 12 Mod. 487. 3 Peere. H. C. L. 245-6. 394. See "Contracts 118".

3. 8 & 2.

It has been holden that if goods are left with depositary in a locked chest, of which bailor takes the key; the former is liable for the chest only, not for the goods. For they, it is said, are not entrusted to the depositary. 4 Co. 83. b. 84. a. 1 Bac. 237. 3 Atk. 47. Co. L. 89. a. b.

(10.) Denied by Holt (L. Ray. 914). For bailee has as little power over them, as to any benefit, when out of the chest, as when in; & as much power to defend them in one case, as in the other. Neither Coke, nor Holt, takes any notice of bailees being ignorant of the contents, or not. But this ought, perhaps, to be regarded. For, upon equitable grounds, at least, that circumstance might be very material; & indeed, all-important. If the contents are known, it is like common cases of deposits. If not known, ought he not to be excused, at least as to the goods, unless the neglect would be gross, even as to the chest itself? Jon. 51-4.

But even a special agreement (ut p. 13.) to keep safely, does not subject bailee, at all events, even if reduced to writing. Excused by acts of God. L. Ray. 910. Casualties. Jon. 62-3. 75. So it will

not make him liable for acts of violence, as robbery &c. Jon. (17.)
62-3. Provided he is guilty of no neglect, which contributed to the loss. — Like a covenant, that lessee shall have, occupy, &c. This does not bind agt the acts of wrongdoers. L^d. Ray. 915. Dr & Stud. 120. 1 Bac. C. 248-9. Hob. 34. (page, 81.) ((Trover, in case of theft, semb. Jon. 62-3. 4 Co. 83.))

Suppose the deposit distrained for rent by depositary's landlord. He would be liable, on ground of gross neglect, or fraud, if he re= moved his own goods. Jon. 142. If he was honest, could not bailor recover in indeb. assump.? If bailor should redeem the goods, by paying the rent; he might recover in assump. for so much money paid, laid out &c. 8 T.R. 308. 3 Esp. 8. Esp. Dig. 10 (31) 85 (170). 2 T.R. 104. See "Assump. 18" — p. 48.

If landlord should sell the goods, & thus satisfy the rent could bailor recover the amount agt bailee, as money paid &c? — R. (11 East, 52. 5 C. 1 Selw. 88. 5 C. 5 Esp 88) that he cannot recover, because the money, as such, was never bailed. Qu. Suppose conversion of another's goods by wrongdoer — sale of surety's goods on execution. What possible remedy can bailor have?

Trover lies agt depositary if he detains the goods after demand, (18.)
or otherwise converts them. 1 Com. 220. 1 Rol. 128. Cro. E. 781. —
He may use the deposit, it is said, where he is at expense in keeping. Jon. 114. (p. 33). (Detinue & assump. are concurrent with trover. Bull. 72. (p. 29. 30. 74).

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III. Commodatum — i.e. a gratuitous loan of goods, to be used
p. 8. by the bailee, & to be specifically restored. Jon. 50. 89. Ld. Ray.
913. 915.

Here (the benefit being to the bailee only), he is bound to more than ordinary care; & is liable for slight neglect, as, as sometimes said, the "least neglect." Jon. 91. Bull. 72. 1 Bac. 244. 1 Com. C. 249. Ex. If a horse is borrowed, & bailee or his servant puts him into a stable not locked, & it is stolen; he is liable. Secus, if the door had been locked. 1 Com. 250. Ld. Ray. 916 &c. ut sup.

(19.) It is a general rule, indeed, that the borrower is liable, in case of mere theft, unless he proves extraordinary care on his part (according to Jones). Jon. 92. 61. n. — Ex. If bailee entrusts the thing (to be carried to the owner) to a person of approved fidelity, from whom, however, notwithstanding great care, it is stolen; bailee not liable. Jon. 92.

Not liable for a loss by such force as he cannot resist. Ld. Ray. 916. 1 Com. 251.

Ergo, generally speaking, the borrower is, prima facie, not liable for a loss by robbery; care being no guard agt. open violence. Jon. 61. & n. 92. Ex. Bailee robbed of a horse on the high road, by a force, which he cannot resist. Ld. Ray. 916. Com. 251.

(20.) But borrower may be liable even for robbery: As, if he exposes himself to it by his own rashness. Ex. If he should leave the high road, & pass thro' a haunt of robbers — in the night season, especially. Jon. 95.

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Bailee of this kind, is not liable, generally, for any of those accidents, called inevitable; as lightning, earthquakes, tempests &c. But he may make himself liable for losses thus occasioned, by a previous breach of trust: Ex. If he borrows a horse for one journey, & goes another; or wrongfully detains for a longer time than he was baited for. Here, he is liable for all accidents, as he would also be for robbery. Jon. 95-6. L. Ray. 915. 1 Com. C. 249-50. 1 Bac. 244. This rule applies to all kinds of bailment. L. Ray. 917. 7.29. 1 Bac. 237-8. Cro. Jac. 244. 1 Com. C. 253.

So he may be made liable for these accidents (as for robbery ante) by his own rashness. Ex. If he places the horse under a building which is in manifest danger of falling; & it does fall & kill the horse. Jon. 95. (21.)

III. "Locatio et conductio" — i.e. a delivery of goods, to be used by bailee, for hire. L. Ray. 913. Ex. A horse hired to ride — a utensil to use. Esp. 526. 7.9.

By this contract, the bailee, or hirer, gains a transient qualified property in the thing baited; & the bailor an absolute right to the stipend or price. Jon. 119. 120.

Here the bailment being reciprocally beneficial, the bailee is liable, according to the general rule, for no less than ordinary neglect; being bound only to ordinary diligence. Jon. 14. 120. (22.) 7.7.

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But it is said by Holt (Ld. Ray. 916) that he is bound to the "utmost diligence." If so, he is liable for slight neglect; & then the liability of a hirer is the same as that of a borrower. Ld. Ray. 916. marg. In 1 Bro. C. 28; Bull. 72, the rule is merely quoted from Holt.

But 1st. Holt's proposition is but a dictum. Besides, Holt himself & Bro. after him do make a difference between the liability of the hirer, & that of the borrower; they lay down the rule generally, that a hirer is excused in case of theft. Ld. Ray. 916. 1 Bro. C. 28. But there is no rule thus generally expressed, in favour of the borrower in case of theft. 2d. Sc. However, is their proposition, in this general form, correct?

(23.)

2ndly. Holt relies for his authority solely on a quotation from Bracton, fol. 62. b. viz. "Talis ab eo desiderat[ur] custodia, qualem diligentissimus paterfamilias suis rebus adhibet." Now, first, in Latin, superlatives are often used where the quality is not intended to be expressed in the superlative. Ex. "Levissima culpa", slight neglect. Jon. 31. Again Bracton's words are transcribed from the commentaries of Gaius, a Roman jurist, & this is the only Roman lawwriter, who uses the superlative adjective. Jon. 121-3.

(24.)

3dly. On Principle: There is ther no decision, nor any clear authority, requiring more than ordinary diligence of a hirer; & Principle & analogy clearly require no more.

The thing hired, then, is to be used & kept with ordinary care. The hirer is excused in case of robbery, unless occasioned by his own imprudence, or want of ordinary care. Jone. 126. Horse hired—

Liver liable if stable door is being left open. Jon. 125.

When a chattel is let for use, bailor is not bound to repair it. Doug. 720. 1 Saund. 321. 1 Bac. 531. See Covenant.

IV. Pawn or Pledge – "vadium" or "pignoris acceptum" – i.e. a de= (25.)
livery of goods as security for a debt, due from bailor to bailee. Jon. 7. 10
30. 104. L^d. Ray. 913. 1 Bac. 237. C. L. 208. 4 Com. 258. Esp. 024.

If one delivers goods to another, under an absolute bill of sale, but it appears from another instrument, that the delivery was to se= cure a debt; & it is agreed in the latter that the vendee may sell the goods, when he pleases, & also that vendor (subject to vendees right to sell) may redeem; the goods are a pledge. 1 H.Bl. 114.

This contract being a benefit to both parties (to pawnee, by secu= ring his debt, & to pawnor, by procuring him credit, or prolonging it); the pawnee is bound, on principle, only to ordinary care, & liable for no less than ordinary neglect. Jon. 105. — And so the (26.)
rule is fully established. L^d. Ray. 917. "True diligence" – "ordinary care" – excuses. 1 Forr. C. 282. Sal. 528. 4 Com. 258.

It has been holden that pawnee is bound to keep the pawn only as he keeps his own goods. 4 Co. 83. b. Co. L. 89 a. cited Jon. 105; – "because he has a property in them." But every bailee has a property in the thing bailed (ante p. 1.) Jon. 112. 1 Bac. 240. 2 Stra. 129. Yelv. 172.

This doctrine in Coke, would subject Bailee only for gross neglect, & not even for that, as the case may be. But this is contrary not only to the general principle, but to the weight of authority. L^d Ray. 917. 1 Bro. C. 252. Jon. 105 &c. Bract. 99. b. Sal. 522. Jon. 105.

He is excused, according to the general rule, in case of robbery. Semb. Jon. 67. 107. 109. 111. L^d Ray. 917. 10. Sal. 522. – Secus. If caused by his own fault. Sal. 522.

(27.) It is holden in Coke (4 Rep. 83. b. Co. L. 89. a.) that if the Bailee be stolen, Bailee is not liable (1 Bac. 237. Palm. 331. or. 23. Yelv. 176. Eds. 024-5.) – Because he is to keep only as "his own" goods, having a "property in them". (it sup.) – Jones holds, unconditionally, that he is liable in case of mere theft; because "a bailee cannot "be considered as using ordinary diligence, who suffers the goods to be taken by stealth" &c. Jon. 106-7. 67.

P. 19. 48. Qu. Is not a question of fact, in every case of theft, whether ordinary care was used or not? So Semb. (2 Hg. Fl. 28. cited Jon. 61. 62. 109. 115. 138); & the general doctrine by Holt &c seems to leave it on this footing. L^d Ray. 917. 1 Vent. 121. Sal. 522. 4 Com. 258. 1 Bro. C. 252. L^d Ray. 918. – See L^d Ray. 918, as to factors, excused
(28.) by "reasonable care" if stolen. See also commodatum, (P. 9), that borrower is liable in case of theft, unless he proves extra-
P. 48. ordinary care. Jon. 92. 61. n. 126. 138. – So in case of Private carrier &c loss by theft excuses, if the property was locked up with reasonable care. Rule adopted by Jones himself (P. 138.)

P. 1. 2. 26. The Bailee gains, like other bailees, a qualified property in the Bailm. L^d Ray. 910. Jon. 112. 3 Sal. 268. Holt. 528. Sal. 522. – Sed.

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vid. 3 Atk. 45. Determined by payment, or tender, of the money due, on the day; & the whole interest is revested in Bailor. 1 Bac. 237-8. – Tender & refusal being, for this purpose, equivalent to Payment. 1 Bac. 237-8. Cro. J. 204. Jon. 111. Gelv. 179. Bull. 72. 4 Co. 83. b. 4 Com. 258. see. 2 T.R. 27. P. 31.

If therefore, after payment, or tender, & demand of the Bailor, on the day, Bailee retains it, he is a wrong doer; & in this case, he is liable for any loss, or injury, in all events; even for inevitable accidents. Jon. 111-12. Esp. 525. 1 Bon. & P. 253. 4 Co. 83. b. Cal. 523. Ed. Ray. 917. This being a breach of trust. 4 Com. 258. (P. 29.) (29.)

On refusal to redeliver, after payment, or tender, at the day, Bailor may maintain trover. 1 Bac. 237-8. 4 Com. 258. Cro. Jac. 244. 1 Com. 220. (1 Rol. 5.) Mo. 841. Jon. 111. "Trover 54." So, if the refusal is by the Bailee's servant, acting regularly in his master's business. 1 Com. 220. Cal. 441. See Bon. 120. P. 18. 74.

So, also, in these cases, the Bailor may, if he so elect, maintain assumpt. on the express or implied promise to redeliver. Bul. 72. Manby vs. Westbrook. (P. 18.) (30.)

But tho' the bailment were upon usurious consideration, Bailor must tender the debt, & (Semb.) the lawful interest before he can maintain either action. 1 T.R. 153. For both actions are equitable. See Trover. 54. & Usury. 30.

Refusal to redeliver on payment or tender, is an indictable offence at Com. Law. This is a rule of Policy. 4 Com. 258. Cal. 522.

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§ 23. 309. — auth^s. cited contra. Cauth. 277. 1 Bac. 240. 2 Hen. 210.; & is intended as a guard to the Pawnor, ag^t. fraud & oppression: The delivery being generally secret, & by persons necessitous or embarrassed!

Said by Jones (Jon. 111) to be laid down in B. N. P. 72. that on tender & refusal, the thing pawned ceases to be a pledge, & "becomes a deposit."* The proposition, at any rate, cannot be true; for a depositary is liable only for gross neglect (p. 12) — but the pawnee in this case, is liable in case of loss, at all events — Indeed, the creditor ceases, in such case, to be a bailee: After tender & refusal, he is dispossessed in his own wrong.
(* I do not find it so laid down by Buller.)

(31.) In some cases, the Pawnee has a right to use the pledge; in others, not. But this right, when it exists, is said to be founded on the Pawnor's consent, expressly given, or presumed. Jon. 112.

The presumption of consent exists, generally, a not, as the pledge is likely to be made better, or worse, or not at all affected, by use. Jon. 112–13. (1. Case of being made better: A setting dog, for by use he is confirmed in useful habits. Jn. 113. — Here the presumption exists.

(32.) 2. So, if it will not be injured by use: Ex. Jewels, ear-rings of gold, &c — But here the Pawnee uses them at his peril; & it is said that he will be liable even in case of robbery. 4 Com. 238. Sel. 522. Dw. 124. 1 Bac. 287. Jon. 113. Bull. 72. 1 Rol. 335. 073. Co. L. 89. L. Ray. 917. — For the use is advantageous to Pawnee only & not in discharge of his duty as bailee. — It is a mere indul-

gence, allowed at Pawnees peril.

3. So, if Pawnee is at expense in keeping the Pledge, he may use it: Ex. a horse, ox. &c Jon. 114. 4 Com. Dig. Ow. 124. Sal. 522. Bul. 72. L^d. Ray. 915. Esp. 025. — He is entitled to use in this case, by way of recompense. (Jon &c ub. sup.)

The Pawnee, in this case, & in the first, is not liable, I suppose, for robbery, while the goods are in use, as in the 2^nd case he is.

The right in the 2^nd case arises from a presumption, founded (33.)
on indulgence; in the present & first, on a principle of justice & duty.

According to the Roman law, the Pawnee is to account for the benefit of the use; not so at Com. Law. semb. Jon. 115.

But if the Pawn will be worse for use (& the keeping is not expensive), Pawnee may not use it. — Here the presumed consent does not exist. Ex. Clothes, &c. Jon. 113. 4 Com. 288. L^d. Ray 917. Bull. 72.

If he does use them; trover, I conclude, lies in the first instance; for unlawful user is a conversion. see Title "Trover". 5 Bac 257. 1 Com. 221. v. 5 Bac. 266.

The law as to Pawns, applies to goods found. L^d. Ray. 917. And, (34.)
according to Powell, the law implies a contract by the finder, to use ordinary diligence &c. 1 Bow. C. 252. — see Cro. E. 219. Esp. 599. 1 Bac 243. 1 Leon. 123. 2 Bulst. 21. Ow. 14. contra; & that he is not

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bound to keep safely — not liable for negligent keeping.

On first thought, the finder does not seem liable on principle for any thing less than gross neglect. (2 Ld Ray. 909) because the sole benefit is to the owner — unless the owner is compellable to pay finder for his trouble (infra). But there is a great difference between finding & deposit. In the latter case the owner has his option to deliver or not; & selects his depositary. In the former, not so. It is not, indeed, a strict bailment. — The finder ought to use ordinary care, or not take the thing. Powell, then, seems right.

(35.) In Conn.t a stat. has made provision for compensating finder. He is therefore, (according to general principles) bound to ordinary care, if he would not otherwise be. Stat. C. 635-6. Our stat. indeed, expressly casts the risk on owner, finder being "faithful." Stat. C. 636. This provision seems to require ordinary care.

In the case in Cro. C. 219, the decision was merely, that trover would not lie; & it was right. For trover lies only for a misfeasance, or positive wrong; as tortious taking, unlawful user, &c Esp. Dig. Sal. 688. 143. 1 Rol. 6. 5 Bac. 207. 3 Burr. 2827. Whereas the case in Cro. El. was for negligence, which clearly is no
3.07. conversion, & which could not, therefore, support trover. Hob. 267. 8 Co. 146. 5 Bac. 269.

(36.) A finder of goods has no lien upon them at com. law, for his trouble, expense, &c; but is liable in trover, on refusal to deliver, tho' his expense is not tendered. 2 Bl. 354. 2 Bl. R. 1117. see Esp. 573. Str. 651. — see "Trover 54".

Bailment—

Case of salvage different. 2 H.Bl. 254. Ld. Ray. 293. 5 Bac. 270. But this depends upon the maritime law.

2d. Can the finder recover a recompense in any way? If he can, it must be by indeb. assumpt. for work &c, in which the Ct. must imply a special instance &c, as well as a promise. Lord Ch. J. Eyre says, "the Ct. would go as far as it could go", towards enforcing the payment. 2 H.Bl. 255. — But on what principle of com. law can it be enforced? — See Voluntary Bailee, Hob. 105. Esp. Dig. 87, 95.

But a refusal, by finder, to restore the goods found, is not, of 7. 91.
course, a conversion. Ex. If the evidence of ownership, in the person demanding, is not sufficient, 2 Bulst. 312. Esp. 590.

Suppose A. finds B's goods — C. claims them; sues A. for (37.)
refusal to deliver, & recovers. B. then makes demand, & sues A. & proves his property. Can he recover? 1 Bac. 242. — Note the analogy to administration repeated &c — 3 T.R. 128. 2 Bac. 11. 1 H.Bl. 669. 682 arg. 1 Doug. 101. Cooke B.L. 370. 2 H.Bl. 408. 2 Str. 180. 1 Root, 545. — I think, the first recovery is a bar to the second action. But the S. C. in Con. has decided otherwise. See "Trover, 61."

If Farmer, having tendered &c, recovers in trover; yet the Farmer is entitled to his debt, & may have his action to recover what is due; but he must first make a demand of the money tendered — i.e. to entitle himself to judgment & costs: Otherwise the Plea of tender, with a tout temps prist, will defeat him, in the action — tho' he is entitled to take the money tendered,

(over)

out of Ct. 1 Bac. 238. 1 Bulstr. 29. 31.

If perishable goods are pledged, & decay; yet Pawnee may recover his money: For the duty continues; the pledge being only a security, not payment. 1 Bac. 238. Yelv. 179. Co. L. 209. 4 Com. 258-9. Sal. 523.

So, of ransom contracts, when the hostage dies, or is retaken. Doug. 619. 3 Burr. 1734. 1 Bl. R. 503.

(38) So, too, while the pledge remains, unimpaired, in Pawnee's hands, he may sue for his debt, & recover; unless there was an agreement to the contrary; — i.e. that he should rely upon the pledge only. 4 Com. 258. Ste. 919. Cap. 85. 2 Lev. 116. Yelv. 179.

If the money is not paid at the day, the property is absolute, at law, in Pawnee; but Pawnor has a right of redemption in Equity*. 1 Bac. 238. Skeph. 105. 3 Atk. 395. Co. L. 205. 2 Vern. 691. 698. 4 Com. 258. — But this right of redemption in equity exists, I trust, only where goods remain in the Pawnee's hands, or have been merely assigned, as a pawn, i.e. as security for the debt. For if absolutely sold, a right of redemption cannot remain. So, Rule in B. R. 1822. (See Christ. Observer, vol. 22. p. 170): And that Pawnee must refund the excess, that he receives, on the sale, over the principle, interest, & expenses.

(* But the rule is otherwise, as to a mortgage of personal chattels, semb. 8 Johns. 90-8. 2 Caines Ca. in E. 200. 5 Johns. 258. 1 Yes. Jr. 378. N.

So, even tho' the agreement is, that the property, if not redeemed at the day, shall be considered as sold. 2 Vern. 698. 1 Bac. 238. 1 Atk. 114. Once a pawn, always a pawn.

Bailment -

A factor cannot pawn Principal's goods so as to give Pawnee P. 80. 89.
a lien as agt. the Principal. He cannot thus transfer the lien Mast &
which he himself has, nor create one, even to the same amount. Jew. 24.
But on tender to the factor, of what is due to him, trover lies agt.
Pawnee. Str. 1178. 5 T.R. 602. 1 H.Bl. 362. 4 Com. 227.

And it has been lately holden that no tender is necessary. (7 East.) (39.)
The Pawning being a breach of trust in the factor, & of course tortious. P. 105. 89.

After the day of Payment* Pawnee may sell the Property; it being
absolute in him, at Law. Co. L. 205. (*After 12 months & a day,
it is held (in B.R. Chr. Obs. vol. 22. P. 170) - In this case, no
time of Payment was, probably, appointed by the Parties.)

It has been said in some books, that Pawnee may, before the
day of Payment, assign the Pledge; i.e. transfer it, ~~with his~~
together with his own lien upon it, to a stranger. 4 Com. 258-9.
Str. 124. 1 Ves. 350. arg. 1 Bulst. 29-31. 1 Bac. 239. But the doc-
trine inferable from Cro. Jac. 244. Yelv. 178. seems otherwise -
And a lien is a personal right, & cannot be transferred. 5 T.R. P. 102.
606. 7 East, 6. See. 1 Bulst. 31. - It arises out of a fiduciary
contract, which is not assignable.

Besides, it is a rule that a pledge cannot be forfeited by Paw- (40.)
nees crime. 1 Bac. 238. Bro. cited - But a man is capable of
forfeiting whatever he can convey in his own right. Co. L. 8. 12 Co.
12. Cro. Car. 550. Mo. 100. 2 Bac 370-7.

Bailment –

Brook also lays down the rule, that it cannot be "aliened." cited 1 Bac. 238. 1 Ves. 359. It is nature of a personal trust, – the owner may be willing to entrust his goods to one, & not to another.

If Bailee might assign at pleasure, Bailor would be in danger of loss. Assignee might be a knave or a vagabond. Different case from that of land mortgaged, which cannot be embezzled.

(41.) 2 Vern. 691. 698. A. Bailor to B– B. before day of Payment Bailor to C. A. brings bill to redeem of C. – Decreed to pay all the money that C. had advanced to B– But the bill was after A's right was forfeited at Law* therefore he must do equity. Esp. 583. S.C. Pre. Ch. 419. 420. (* Note. Else, why was the application in Chanc.y?) – A's equitable claim was, therefore, the same, as if the assignment had been after forfeiture. If tender had been made before forfeiture; the result, I trust, would have been different. vid. Velv. 179. c.

Again: A Bailor cannot be taken in execution, nor attached for Bailees debt. 1 Bac. 238. 352. cites Bro– L.P. in Com. 4 Vol. 258. Dr. 87. b. & Dw. 124 cited. – The principle, in this case, must be the same, as should govern on the question of assignment before forfeiture.

On the other hand, the Bailor may forfeit his right in the pledge by felony &c; tho' the king cannot have it without paying the sum due to Bailee. 1 Bac. 238. 1 Bulst. 29. 4 Com. 259. Velv. 179.

The conclusion, from these rules & analogies, seems to be, that Bailee cannot assign before forfeiture.

Bailment.

Anciently it was deemed essential to a Pawn, that it should be (42.)
delivered at the time when the money was lent, or the debt accrued:
Otherwise, it was considered, not as a Pledge, giving a special Prop-
erty to the holder; but merely as a license, to excuse a trespass*.
1 Bac. 238. — Secus as the law now is. 1 Bac. 238. 2 Leon. 30. Yelv.
164. 1 Ves. 350. arg^t. 359. (*The delivery was, of course, countermand-
able, I conclude.).

And if A. delivers goods to B. as security for a debt, already due
from A. to C; C becomes Pawnee, with a qualified Property: — So
that A. cannot countermand the delivery*. 1 Bac. 238-9. 2 Leon.
30-1. Yelv. 164. — It was formerly holden contra. 1 Bac. 139.
by. 49. — (*Is not the rule, in the case supposed, founded on (43.)
an agreement between A. B. & C, that the delivery should be
to B? It seems so. Bull. 35. 1 Bulstr. 68. Esp. 570.)

Formerly doubted, whether, if no day of Payment were fixed;
Payment, or tender, would revest the Property at Law, unless it
were made during the joint lives of the Parties. But it has been
since holden that Pawnor may thus redeem, at any time, dur-
ing his own life; provided, (it is said) Pawnee does not call on
him to redeem sooner. (2 Caines. Ca^s in E. 200. Yelv. 179. a &c. n.
Vide. 138 & 144 marg.) (Yelv. & Cro. contra); — even after Pawnee's
death. 1 Bac. 239. 4 Con. 28. Cro. Jac. 244-5. Yelv. 178. 1 Bulstr.
29. 2 Co. 79. — vid. L^d Ray. 434. 1 Ves. 278. Obter contra. —
Is not the rule, now, that Payment or tender, must, (to revest
the title at Law), be made within a year & a day? (P. 39.)

And if Pawnee, before his death, delivers the Pledge to I. S. with-
out consideration; tender is to be made to Pawnee's executor; not to
I. S. — And if, after such tender, I. S. refuses to redeliver, he is

(44.) liable in trover. 1 Bac. 238. Cro. Jac. 244-5. Yelv. 178-9.

But if Bailee, in the last case, (the Bailor being living) had delivered it to J. S. on consideration; the question, to whom the tender must be made, is the same, as, whether Bailors are assignable before the day of Payment. (P. 39-42) It is to be made to Bailee's executor, according to Yelv. 178. see 4 Com. 259. Secus, according to 1 Bulst. 29, semb. — (If the assignment is a breach of trust, what need is there of a tender to any one, for the purpose of revesting Bailor's title?)

But, there being no time fixed, (at Law) the Bailm., it is said in the older books, must be redeemed, (v.c. Payment, or tender, made) during Bailor's life, if at all. His executor cannot claim a redemption at Law: * (*Vid. Yelv. 179 c. (n). contra) 1 Bac. 239. 1 Bulst. 29. Cro. Jac. 244. Yelv. 178. 4 Com. 258. Bre. Ch. 420 — Is not a year & a day the time, now established, for redemption at Law?

(45.) It is supposed, however, that equity would relieve, by allowing a redemption, after forfeiture, at Law, 1 Bac. 239. note. — This seems reasonable: For when a day is fixed by the Parties, & past, there is an equity of redemption. Co. L. 205. 2 Vern. 591. 598.

If a day is fixed for Payment, the Bailor's interest is not forfeited, by his death before the day. His executor may redeem, by Paying or tendering, (& Bailee) if no day is appointed by the Parties: The Law, in such cases, fixes the time (P. 39.) 4 Com. 259. 1 Bac. 239. 1 Bulst. 29). — as he might have done, if living. If executor pays or tenders at the day, the absolute Property is revested; if

not, he has an equity of redemption.

V. A delivery of goods to be carried, or for some other act to be done about them, to bailee, for reward. (P. 10). L^d Ray. 913. 917. 1 Bac. 343. Jon. 55. 127-8. 144. Bull. 72. 1 Bro. C. 253. (46.)

This delivery may be to a private carrier, or other private person; or, to one who exercises a public employment (L^d Ray. 917-18) as a common carrier, innkeeper, &c Jon. 132-4.

1. Of delivery to a private carrier &c - (i.e. to any person not exercising a public employment) — This includes a delivery to one in a private professional character; as a tailor, or other mechanic; as also a bailiff, factor, &c, as well as to a special carrier. L^d Ray. 918. Jon. 128-9. 55. — Or to an existing farmer. Jon. 129- (47.)

Here, the bailment being reciprocally advantageous; the bailee is, on principle, bound only to ordinary care, & liable for ordinary neglect only. Jon. 14. 22. 32. 128-9. 131. 133-4. 138. 1 Rol. 4. No. 5 & 43. And so is the law settled. L^d Ray. 918. 1 Bro. C. 284. - (If he uses "reasonable care", he shall not be answerable; by Holt, L^d Ray. 918.) — 12 Mod. 487. 1 Vent. 121.

If goods are delivered to such private person, to carry &c, & he is robbed; he is, according to the general rule, excused (i.e. Prima facie); The force being irresistable by him. Jon. 129-30. 138. "Mast. & Serv^t" 58.

(48.) So, of a tailor, an agisting farmer depasturing cattle, a factor, &c. Co. L. 89.a. L^d. Ray. 918. 1 Holt. 131. 4 Co. 84.a. 1 Mo. 452.

p. 27-8. In case of theft merely, if the property was locked up with "reasonable care" the bailee is excused; otherwise he is not. Jon. 138. 1 Vent. 121. L^d. Ray. 918. 2 Lev. 5. 1 Rol. 4. Mo. 543.

If the thing bailed is distrained by bailee's landlord, for rent, & sold (as it may be, 3 Burr. 1498. 3 Bl. 8); the bailee, according to p. 17. Jones, is liable; for this is, at least, ordinary neglect. Jon. 141-2. 3 Bl. 8.

(49.) This rule is common to every bailee who receives compensation of any kind, for keeping, a doing, as a carrier, a tailor, &c (Jone. 141-2) & generally, where the contract is reciprocally advantageous.

(19 Johns, 44. vid.) According to Jones, if silver is delivered to a silversmith to make into an urn &c, he is not a bailee. He may, therefore, use it for another person, & restore an equal quantity of the same quality: Jon. 89. 143. The contract is no bailment, but a mutuum. (p. 9.) The property vests absolutely in him, & he bears the loss (if it is lost) at all events.

The reason, on which Jones's opinion is founded, seems to be, that the form of the property, is, by the terms of the contract, to be so altered by fusion, that it cannot be identified: Therefore, it cannot be specifically restored, in legal contemplation. And, of course, could not have been intended to be so restored. And if so, the delivery cannot be a bailment. It is somewhat like the case of manufacturing flour into bread — grapes into wine, &c. 2 Bl. 404. Mo. 20. Soph. 38.

Bailment.

It seems difficult to deny the plausibility of this artificial view of the case: Sed qu. whether the law so considers it? (Sel. 305.)

The case, I think, is not exactly similar to a mutuum of (50.)
flour &c to be consumed: In the latter case, the same specific thing, is never, by the terms of the contract, to be restored in any form. Would not the true rule be this: If the silver lost, has not been used for another purpose, & can be proved to be the same as was delivered, the loss is to be borne by bailor & employer — unless the smith was guilty of neglect of due diligence: And also, if guilty of such neglect, or if the metal lost could not be identified by proof?

When the bailment is to a person, to do some act of skill, in p. 77.
his professional character, for hire, the law implies a two-fold contract; — not only to redeliver the thing, but to do the work skilfully. Jon. 128-9. 137. 140. 1 H.Bl. 158. — as to a tailor, or other mechanic, 11 Co. 54. a. 3 Bl. 165-6. 1 Saund. 324. Esp. 601.

But if the act to be done, is not in the line of bailee's profes-
sional, or common, business; the law implies no engagement on this part, that the act shall be skilfully done. He cannot be made liable for not using skill, without an express agreement. 3 Bl. 165. Esp. 601. Jon. 139-40. 1 H.Bl. 158.
(But of this under title "Actions on the case") (p. 77)

Ordinary care does not oblige bailee to insure the thing agt (51.)
fire. Selwb. Jon. 142. — Usage might vary the rule. Presume. p. 5.

Bailment.

If goods delivered to a bailee of this 3th kind, are lost or destroyed, (while the work or act to be done remains unfinished), by a neglect of that degree of care, which the law requires of him; is he entitled to wages for what he has done? Semble, not. (3 Burr. 1732-5); for the bailor receives no benefit from his work. Esp. 85.

2. Of delivery to a person exercising a public employment in the way of his professional business; — as common carriers, innkeepers, &c. L^d. Ray. 918. Jon. 132-4.

(2.) First, of common carriers: — A common carrier, it seems, is any person in general, who makes it his business to carry the goods of others, for hire. Ex. A common waggoner — a common porter — a common boyman — a common ferryman, when paid for carrying goods — a master of a ship &c. L^d. Ray. 918. Atk. 93. 1 Bac. 343-5. 4 Co. 84. Jon. 149-50-1. C. L. 89. Hob. 18. Cro. Car. 330. T.R. 27. Ray. 220. 1 Com. 212. 1 Rol. 2. Esp. 619 &c. 624. Wats. 81-2.

It seems to have been formerly doubted, whether any other than a carrier by land, fell within the description of a common carrier. The law, regarding common carriers, was first extended to common boymen, in the 11th of Hen. I. Jon. 149. Hob. 17-8. Cro. J. 330. 12 Mod. 487.

(3.) First extended to masters of ships in the 25 Car. II. Jon. 152. L^d. Ray. 918. Ray. 220. 1 Vent. 190. 238. 2 Show. 89. "Insurance 30"

So, the owners of ships employed in carrying goods for others, are common carriers; & the action may be brought (in nature of an action agt. a common carrier), agt. either the master, or owner. Esp. 623. Sal. 440. T.R. 78. 18. 1 Com. 212. 3 Lev. 259. Show. 2 9. 101. Carth. 62.

But by Stat. 7 Geo. II. the owners are liable only to the value of the ship & freight, where the loss is occasioned by the mis-conduct of the master or mariners. 1 T.R. 14. 78. So by 26. Geo. III. c. 86, where it is occasioned by strangers. Marsh. on Ins. 150. (See "Insurance" 32)

If a common carrier, having conveniences to carry, & being offered his hire, refuses to carry, he is liable to an action. 1 Bac. 344. 3 Bl. 180-2. Bull. 70. 2 Show. 327. 3 Bl. 165. Hard. 103.

But a common carrier may make a special, i.e. conditional, acceptance: Ex. that he will not be answerable for money, &c unless he has notice, & is paid in proportion to the amount or value. Esp. 622. 4 Burr. 2298. — He may, therefore, refuse to carry except upon such condition. (54)

The bailment, in the case of a com. carrier, being reciprocally advantageous, he would (if there were nothing to impede the application of the general principle), be liable for ordinary neglect only. Jon. 144. And this seems to have been the rule, so lately as the reign of Hen. VIII; when it was holden, that a com. carrier was not liable in case of robbery, unless (as in the case of lending for hire, ante), his own impudence gave occasion to it. Jon. 144.

But it was settled in the reign of Eliz. that robbery was no excuse, Jon. 144-5. Co. L. 89. a. Mo. 402. 1 Rol. R. 4 Co. 84. a. 1 Bac. 345. (33.)

And the rule now is, that he is liable for losses occasioned in any way, except by the act of God, of the Public enemies, or of the bailor. Bull. 70-1. L. Ray. 918. 3 Burr. 1893. Stra. 128. 1 East, 609.

Bailment.

1 Sow. C. 253. Jon. 144-5. 1 T.R. 27. Holt, 131. 1 Wils. 281. Sal. 18. 1 Vent. 238-9. 1 Bac. 345. n. Esp. 619. 621. Bull. 74.

The true foundation of this rule is public policy*; which requires an exception to the general principle: Least carriers should "combine with robbers, to the infinite injury of commerce". Jon. 145. L^d. Ray. 918. 1 T.R. 34. 1 Bac. 345. Esp. 618. Sal. 143.
(* Not the reward, as alleged by Coke. (Co. L. 89. a. 4 Co. 84. a): For this reason would extend to the case of a private carrier.))

(56.) He is not liable, indeed, to this extent, unless he carries for reward: Because, if he carries gratuitously, he does not act as a com. carrier. Esp. 621. Carth. 485. And if so, he is not liable as com. carrier. 1 East, 604. — But to say that he incurs this high degree of responsibility, because of his reward, is equivalent to saying that he incurs it because he is a com. carrier — which would be no reason at all.

A com. carrier, then, is in nature of an insurer agt. all events except the acts of God, &c. By the act of God, is meant, according to L^d. Mansfield, "such an act, as could not happen, by the intervention of man". 1 T.R. 33. Ex. tempest, lightning &c. Str. 128. — Fire, occasioned otherwise than by lightning, is not the act of God. 1 T.R. 34. 2 H. Bl. 113. Dy. 66 b. Esp. 620.

(57.) Rats' gnawing a hole thro' the ship is no excuse. Jon. 147. Bull. 70. 1 Wils. 281. — Jones says (147-8) that "letting the rats gnaw" &c, is ordinary negligence. — Qu.

Not excused by the act of "rebels" – for they are not "enemies," within the rule; but Pirates are. 1 Vent. 239. – "Freshwater Pirates" are not, (i.e.) mere Bantoon robbers. 1 T. R. 18. Esp. 620. 1 Vent. 190. 1 Mod. 85.

If a tempest makes it necessary to throw bailee's goods over-board, the carrier is excused. 12 Co. 63. 1 Bac. 345. For the necessity of doing it is imposed by the act of God. Jon. 131. Esp. 620. 1 Rol. R. 79. 2 Bulst. 280. 2 Rol. 567.†

(In one case, where a box of jewels was thrown over, the master was holden not excused. Alk. 93. Jon. 151. – Probably the box was light, & there was no necessity.) (5 B.)

†But in this case, the master, owners, freighters, (& passengers*) must average the loss according to Law Merchant. 3 Bac. 394-5. St. C. 291. Poot. 50-1. East, 220. Beawes L. M. 148. 2 T. R. 407. "Chartering." ((*2 Ld. Jassengers: Marsh. Ins. 486.))

But if a com. carrier voluntarily or unnecessarily exposes the property to danger from the act of God, &c; the act of God shall not excuse him. Esp. 620. Ex. If a common boyman had voluntarily put to sea in very tempestuous weather, when a loss was probable. Str. 128. 1 Com. R. 487.

Excused, if the loss is occasioned by bailee's act, or default. Ex. If a pipe of wine bursts, while in carrying, from being in a state of fermentation. Bull. 74. 69. Esp. 621.

(59.) So, if the carrier's waggon is full, & the owner forces the goods upon him; it is his own folly, if they are lost. 2 Show. 127. 1 Bac. 344. (Post, Innkeepers, 127) -

But in order to charge the carrier, as above, the goods must have been lost, while in his poss^n or under his immediate care & control. Esp. 621. Ex. If the owner sends his servant in a boy or vessel, to take care of the goods, & he takes charge of them, & they are stolen; the carrier is not liable for the loss - i.e. I suppose, not liable as a com. carrier (Esp. 621. Bull. 70. 2 Show. 327. Stra. 690. 1 Bac. 344); for they are not considered as in the carrier's poss^n. — Secus, if they are delivered to the carrier, but a passenger is requested to take care of them (1 Bac. 344. 1 Rol. 2. Cro. Jac. 330. Hob. 17.) The carrier then has the controul of them. ((* He would, doubtless, be liable, however, if the loss was occasioned by any actual default of his: Ex. By vessels being not sea-worthy, by misconduct, negligence, &c.))

(60.) It seems that a com. carrier, tho' ignorant of the contents of a box &c, is liable for them, in case of loss, unless he discharges himself by
p. 15. a special, i.e. a qualified acceptance. Bull. 70. 2 East, 128. So.
p. 129. 145. Etr. 145. 1 Bac. 345. Cartt. 485. — This seems to be correct, on principle, tho' I have questioned the rule, in the case of a depositary: For the liability of a com. carrier does not depend upon the question whether he has been careful or negligent.

So, according to two decided cases, tho' the carrier is misinformed of the contents by the owner; he is liable, unless he accepts specially. All. 93. Bull. 70. Ex. Where the box contained a large sum of money, & the carrier was told by the owner, that it contained "silks & such like goods of mean value;" the carrier, being robbed,

was holden liable. cited 1 Vent. 238. 1 Com. 213. 1 Bac. 345.

So, where a box, containing £100 in money, was said by the owner to contain "a book & tobacco" the carrier was holden liable, because there was no special acceptance. But Roll. J. said, that less damage might be given. All. 93. 3 Keb. 135. Jo & Stud. 130. (61.)

Both of these decisions are disapproved of by L. Mansfield, & the rest of B. R. (4 Burr. 2300, &c) on the ground that the fraud ought to excuse. 1 East, 510. — Acc. Ex. 143. per L. King. — So, by Jones (148) who considers these two cases in All. &c overruled.

For the purpose of making a special acceptance, it is not necessary that there be a personal communication between the owner & carrier. And advertisement in the public papers may be sufficient; i.e. the jury may infer from it, that the owner had knowledge of the carriers terms. Bull. 71. 4 Burr. 2298. &c. Esp. 622. Cauth. 485. — see. 1 H. Bl. 298-300. n. 8 T. R. 531.

Under a general acceptance (except in cases of fraud, vt sup) he is liable for all that he receives: But if he accepts specially, he is liable for so much only, as he undertakes to carry (Esp. 621. & author. sup); i.e. as com. carrier, he is chargeable for so much only, as his reward extends to; as to anything more, he acts, indeed, not as com. carrier. Ex. Where, under a special acceptance, a bag containing £400, in money, was delivered, being told by the owner that there was but £200, & paid for no more, he was holden chargeable for no more. Cauth. 485. Esp. 621. Bull. 70-1. — See 1 H. Bl. 298, where the owner, having concealed the value, carrier was holden not liable at all. But there, (62.) (63.)

the carrier had published by advertisement, that he would not be answerable at all, for certain valuables, over the value of £5. except on certain conditions, which conditions Pfff knew, but did not comply with. See also. Esp. 622. 4 East, 371. 5 Bl. 6 Bl. 564.

The master of a stage coach, who receives hire for passengers only, not for baggage, is not liable for the loss of the latter. 1 Bac. 343. Com. R. 25. Sal. 282. Bull. 70. Esp. 622. 624.* vid. 2 East. 419. Seeng, if he carries goods for hire. 1 Bac. 344. n. 2 Show. 128. Sal. 282. —— The owners riding in the same coach, does not absolve the master of the coach. 2 East, 419. ca. cited.

((* Does not the fare of our stage coaches extend to the baggage, allowed to passengers? i.e. is not the carriage of a passengers baggage the part consideration of another gainful contract - viz, the contract to pay for the conveyance of the person of the owner? Is not his conveyance & care of the baggage, rewarded by this latter contract?))

(64.) A com. carrier is liable, without an express promise, by the owner to pay the hire; since the former may recover on a quantum meruit. 1 Bac. 343.

To charge the carrier, it is not necessary that the goods be lost in transitu. If they are lost at the inn, where he arrives, he is liable. (Ow. 57. semb.) He is clearly liable in this case, if the custom, or course of business, is for the carrier to deliver to consignee. 2 Bl. R. 910. 3 Wils. 429.

And he seems to be liable, of course, till the delivery to consignee, unless the established custom is not to deliver there. 1 Bac.

Bailment -

345. Ow. 57. 2 Bl. R. 917. agst: Esp. 623.

Where the custom &c is not to deliver to consignee; but to keep &c, he is not liable, as com. carrier, after they are deposited according to the custom: Esp. 623. 4 T. R. 581: Tho' he may be liable, as a bailee of a different description. (65.)

If the consignee of goods, directs by what carrier the consignor shall send them; the consignee, not the consignor, must, regularly, bring the action. Comp. 294. 8 T. R. 330. Esp. 570. Bull. 35. 1 Bow. C. 348. 353. "Contracts, 110". — For in such cases, the consignee is the bailor, & the consignor, in making the delivery, is his agent. The consignee, therefore, as between himself & the consignor, stands to the risk. Comp. 294. p. 118.

Secus, if consignor elects his own carrier. So, if he makes himself liable, by agreement for the price of the carriage, or takes the risk of the conveyance; he may sue. 8 T. R. 333. 5 Burr. 2680. 1 T. R. 659. The agreement makes him a Principal; there being an express contract made with him.

But if one sends an order for goods to be sent by a carrier (naming no one), & vendor delivers them to a com. carrier, in the usual route; they are at the risk of the vendee. Esp. 42. 3 Bosc. 582. Such direction warrants the delivery so made; & the consignor acts as agent. For the order is, in effect, to deliver to any com. carrier.

When an action is brought agt. shipowners, as com. carriers, they must all, it is said, be joined; for the right of action arises ex quasi contractu, not ex delicto. Esp. 623. Sal. 440. "Treasp. on Ca. 13."

(66.) But even when the suit is on contract, non joinder of all is pleadable in abatement only. 5 Burr. 2611. 2614. 5 T.R. 651. Ld. 440 cont. But the true rule is, that if they are sued on the contract, all must be joined: Aliter, if the action sounds in tort — as for negligence. 5 T.R. 649. 651. 3 East, 62. 70.

They are liable, because the master is their servant, & they receive freight. See. 5 T.R. 651.

At com. law, a Postmaster (not being an officer, appointed by law), was liable as a com. carrier for letters &c. Jon. 153.

"Hast & Serv." 42" But since the establishment of a general Post office by law, & the suppression of Private Posts (by stat 12 Car II) a Postmaster has been holden not to be a com. carrier. Jon. 153. Gal. 17. L. Ray. 646. Comyn. 754. 764. — For he makes no contract with the party — receives no hire from him — & policy forbids his liability.

(67.) Not even liable for default in his servants. (Case in 3 Wils. 443, was ag^t. deputy postmaster, for his own actual default. Comyn. 765. Ld. 18)

Com. carriers are said to be liable on the "custom of the realm;" & the common mode of declaring has been to count upon, & recite, the custom^th. 1 Ld. 245. Hard. 485-6. 1 Bac. 343. — But this seems unnecessary: For the custom being general, is no other than a branch of the com. law. 1 Bac. 343. Jon. 130. Hob. 18. 1 T.R. 33. 3 Mod. 227. (Is such the mode of declaring at this time?)

When property is stolen from a com. carrier, or otherwise lost, or injured, so as to subject him (he being guilty of no actual misfeasance); the remedy ag^t. him is by a special action on the

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case – not trover. If he is guilty of a misfeasance, trover lies. Sal. 688. Esp. 590. Hob. 265. 8 Co. 146. 5 Bac. 207. 5 Bun. 2827. Esp. 580. p. 35.
Ex. breaking box – destroying goods &c

Not liable in trover, even for actual negligence. Sal. 688. (68.)

Secondly of Innkeepers (see p. 1265 ult.) A delivery to an innkeeper seems to fall, most properly, under this 2nd general head of the 5th class of bailment – A bailment of this description, being a delivery of goods to a person, exercising a public employment, in his public professional character, for some act to be done about them, or care bestowed upon them, for reward. Jon. 130–2. p. 10. 40.
(* Any person, who makes it his business, to entertain, lodge, & provide necessaries for, travellers, & their horses &c, for reward, is a common innkeeper. 3 Bac. 179. Palm. 374. 2 Rol. R. 345. – In Cont. appointed by officers of the Law. St. C. 408.) p. 129

Esp. (528–0) classes it under "commodatum," a lending gratis. But (69.)
there is not the least resemblance between the two cases. Lending gratis is to a private person (i.e. a person in his private capacity) p. 8. 18.
for use &c, for his sole benefit. — Bull. in his N. P. 73. treats of it under the 5th kind – i.e. a delivery of goods for bailee to carry, or to do some act about them, gratis. – – But. 1. The delivery in this last case, is always to a person as a private individual; i.e. as bailee, he is not a public character. –
2. In case of horses &c, kept at an inn, the hosts care &c, is, clearly, not gratis; nor indeed, in the case of inanimate goods – for in the latter case, his care is rewarded by another gainful contract – viz. that, by which he is bound to entertain the owner. Jon. 132. 134.

(70.) Indeed, the price, paid for an apartment, may be considered as extending to the care of the baggage, & in part, as storage for it. Jon. 133.

The general law as to innkeepers post page 1295 c. – I here present only a few general rules, as to their liability for goods of guests, when lost or injured; i.e. I treat of them under this title only so far, as they are bailees.

The bailment being reciprocally advantageous, the innkeeper wants, according to the general principle, be liable for ordinary neglect only. Jon. 133-4. 135 t. – But the policy of the law has extended his liability somewhat further; not so far, however, as in the case of com. carrier, it seems. Jon. 133-4. 136. a. b.

Qu. Does not policy require the same responsibility as that of a com. carrier? Yelv. 182. a. n. 1.

(71.) He is clearly liable for any losses occasioned by his servants, in any way: for he is bound, at all events, to provide honest & careful servants. Jon. 134-5. Cap. 626. 8 Co. 32-3. Bull. 73. 1 Bl. 430.

So, if the goods of a guest are stolen by a stranger, the host, according to the general rule, is liable, (Jon. 134. Cro. J. 224. 8 Co. 33. a. Cro. J. 189.); whether he has been negligent, or not. (5 T. R. 270.) – Here, the general rule requires more than ordinary care. Policy requires it.

Aliter, when the goods are stolen by the servant, or companion of the guest, (Cap. 626. Cro. E. 288. 8 Co. 33. a. 3 Bac. 183.); or by any one who lodges with him, by his request. 1 Com. 211. 8 Co. 33. a. 3 Bac. 183.

So, I conclude, he is liable, in case of common robbery, on the same principle of Policy. Semt. 8 Co. 32. a. Jon. 135. a. b. Flow. 9. 3 Bac. 182. (72.)

In Flow. (9.) it is said that if the inn is broken, & the goods taken, by the "kings enemies," the host is excused; which seems to imply that other human force would not excuse. But I do not find so rigorous a rule expressly laid down in any of the authorities. Jon. (135. b.) asserts it, as law, that a force, truly irresistible, does excuse him. And Flow. in assigning the reason of the host's being excused in the case, which he puts, says, "For, in reason, such violence cannot be resisted." I conclude that Jones's rule is law. If so, a loss occasioned by the act of a mob might not subject him.

I do not find any rule subjecting the host to the same extent, to which com. carriers are liable. Therefore, Qu. — (By the Roman law, (Jon. 134-5) he is liable except for inevitable accident.) Ought he not on principle to be liable to the same extent? Selw. 182. a. n. 1. (73.)

In 8 Co. 33. a. (cited 1 Com. Dig. 229. Esp. 620-7) it is holden that an innkeeper is not liable, unless there be a "default in him, or his servants." Denied by Buller J. (5 T. R. 276); & said that it is "not necessary to prove negligence". This is the true rule.

He is liable, as an innkeeper, for such goods only, as are infra hospitium. But the hospitium includes stables & offices. 8 Co. 32. b. Esp. 620-7. 14 Johns. 175.

Where they are moved out of the inn, by the guest's directions, he is not liable. (8 Co. 32. b. 1 Rol. 4. 1 Com. 210. Bull. 73. Esp. 627.) unless lost by his actual default. Ex. guest orders his horse to be sent to pasture, & he is stolen. But if the host does it, without such directions P. 127.

he is liable. Idem.

(74.) (For the rest of the law as to Innkeepers, see tit "Inns &c" p. 120.)

p. 18. 29. 30. In bailments of the 3rd kind, if damage is done by bailees negligence; bailor may declare in assumpt. or the agreement, or in tort. Semb. 3 East, 62. 1 Wils. 282. 2 Wils. 319.

VII. "Mandatum" — i.e. a delivery for bailee to carry, or to do some other act, gratis. Jon. 50. 73. Ld. Ray. 918. Bull. 73. Bor. C. 254. Called in English mandate, or acting by commission. Bor. 254. Bull. 73. (The word "commission", in its present ordinary acceptation denotes a bailment to one who receives a reward. Jon. 73. 1 H. Bl. 159-60. arg.)

Distinction between this and deposit:— One lies in custody, the other in feasance. Jon. 73.

(75.) This contract is for the benefit of bailor only; therefore, according to the general principle, bailee is liable, under a general acceptance, for no other than gross neglect — i.e. violation of good faith. Jon. 74.

And so, clearly, is the general rule established by the authorities. 1 Bor. C. 255. 1 H. Bl. 158. 160-2. Ld. Ray. 909. 919.

But where there is an express engagement by bailee to use all necessary care & skill, or any other given degree, & a loss happens by his omitting to use it, he is liable. Jon. 75. 1 Bor. C. 255. Ld. Ray. 909.

And such an engagement to use all necessary care & skill, may be implied in certain cases. Jon. 74. 1 H. Bl. 161-2.

Such an undertaking, then, it would seem, may subject him for (76.)
less than gross neglect. 1 Bow. C. 253. Jon. 87. But according to
the case in 1 H.Bl. (155) or rather the agreement of the court, when
the engagement is to do an act skilfully, or where a general under-
taking implies that the act shall be done skilfully, the omission
of the necessary skill is gross negligence. 1 H.Bl. 151-2. So, ac-
cording to Holt (L^d. Ray. 916) it is a "deceit"; a "fraud"; a "breach of trust"

The breach of the engagement being, in all cases, & of course, gross
neglect. — Sedgw. For this confounds all distinction between (II)
different degrees of care & neglect. (p. 4-5.) Indeed, according to
this mode of reasoning, the omission, by any bailee, of the degree
of care, expressly or impliedly stipulated, is gross neglect: And
of course, the neglect which subjects a bailee is always gross.
But such a doctrine would reduce all bailees, (so far as re-
gards care & neglect), to a level; & this would be to derange the
symmetry, & indeed, the fundamental principles of the whole
system. It might as well be said that a com. carrier (p. 50)
from whom goods are taken by a mob, however large, is liable on
the ground of gross neglect.

But such an engagement is not implied, unless the act to
be done, is in the way of bailees professional occupation.
3 Bl. 165-6. 1 H.Bl. 158. Jon. 139-40. 11 Co. 54. a. 1 Saund. 324. Esp.
610. — Thus Powell, J. in Coggs vs Barnard, intimates, that
the special assumpsit, to carry "safely" was what subjec-
ted the defend^t. L^d. Ray. 910 — Mr. Jones, however, contends,
that the nature of the bailment implied the same underta-
king. Jon. 84-5. new edition, 70. Sedg. Ed.)

Jones, however, (73-4. new ed^n. 61. 70. 72) makes a distinction between the duty of a bailee, when it lies in feasance, (i.e. in performing work) & when in custody or in carrying only. In the former case, he holds greater diligence is required, than in the latter; the implied engagement being, "to use a degree of "diligence &c, adequate to the performance of the undertaking." This passage is contrary to 1 H.Bl. 158. &c. 3 Bl. 165-6. Jon. 84-5. & p.79. p.80. as I think, to principle also. It wants extend the liability of a mandatary beyond that of a private bailee of the 3^rd^ class.

(78.) When there is no engagement, express or implied, to use skill, or more care, than the bailee takes of his own goods, the bailee is liable for gross neglect only. Jon. 74. 1 Bom. C. 207. Ex. A merchant engages gratis, to enter B's goods with his own, at the custom house; but enters them, with his own, under a wrong denomination, & they are seized. He is not liable. 1 H.Bl. 158.

(79.) Secus, if a tailor should engage to make a garment, gratis. Here, the undertaking implies that all necessary skill & care, p.77. in making it, shall be used.

And Jones agrees that a bailment to carry gratis does not imply an agreement by mandatary to use all necessary care; & that he is liable for gross neglect only. Jon. 87. new ed^n. 72. p.77. Qu. as to any distinction between doing & carrying.

(80.) The engagement thus implied by law, (where the act to be done is in the line of bailee's occupation - p.77), extends, however, it seems, only to the feasance, or doing, of the act stipulated. It does not provide agt. accidents from foreign causes - i.e. caus-

=es

ges not connected with the performance of the act. Ex. In case of the tailor, who is to work gratis (sup) the implied undertaking to use all necessary care &c does not subject him for losses from robbery, &c. So far as relates to such accidents, there is no implied agreement to use all necessary care; & bailee is liable for gross neglect only, I apprehend. (see L^d Ray. 918. case supposed of a drunken mans piercing the cask &c. 1 Bow. C. 285 Bull. 73)

But bailee may bind himself to be answerable for casualties. Jon. 75. L^d Ray. 910. (81)

But his express promise to carry safely, does not make him answerable for losses occasioned by the act of God, - casualties or robbery, semb. Bow. P. L^d. Ray. 910-1. — It binds him only to necessary care, in carrying, or executing his trust. Does it subject, except for some degree of neglect? L^d. Ray. 915. Jon. 82. (p. 10. 17) — semb. not. p. 10. 17.

And he cannot, by even a special agreement, exempt himself from liability for fraud. Such an agreement is contra bonos mores. Jon. 66. 75.

Tho' it seems, from the language of some of the books, that when any degree of care &c, is expressly or impliedly stipulated, the omission of it is gross neglect, & that the bailee of this class, is liable only on that ground, not on his contract. Yet the authorities are equally clear, that, on delivery of the thing the engagement binds, as a contract; but not before delivery. (L^d. Ray. 919-10. 919-20): And that bailee is liable, as for breach of contract (5 T. R. 143. Case of promise to build a house gratis (p. 15) — (82) p. 75. 15.

"Delivery" "entering on the trust" is a good consideration. (Action on the case) Marsh. Ins. 207. 1 Esp. ca. over.

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74. L^d Ray. 920. 1 Bac. 241. Dr. & Stud^t. 129. 12 Mod. 487. 3 Reeve. Hist. 245-6. 394. 5 T.R. 149-50. 1 Bow. C. 364. Cro. J. 607. — Cont. Yelv. 4. 128. see "Insurance 40"

Case in Cro. J. 607-8, was thus: — A. delivered money to B. on a promise by B. to deliver it to C. No other consideration than the first delivery — B. failed to deliver it over — A. brought assumpt^t agt. B. on the express promise, & recovered. (Yelv. 128. cont. an older case). In this case, if the original contract had not been binding, as a contract, A. could not have recovered on the express assumpsit. L^d. Ray. 920.

(83.) Where special damage has been sustained by a party, not taking the goods &c, according to agreement, action lies, according to Jones, tho' the promise is gratuitous. Jon. 76 to 80. (2 Bl. 5 T.R. 140. 149.) Jon. revers^d. 71) — How can the action be maintained, unless actual fraud appears? For the contract, while wholly executory, does not bind. Vid. 4 Johns. 84. agt. the rule.

Jones says, also, that the ground of the action, in these last cases, is the special damage (Jon. 79-80) But it accrues from breach of contract; & if the contract does not bind, how can there be a remedy for damage arising from the breach of it? And how any wrong, unless there is actual fraud? Ex. A. expecting to go a voyage or journey, engages, gratuitously, to convey a letter or parcel for B.; but by reason of some disappointment, or some unexpected emergency of business, fails to go — & B. sustains special damage: Upon what principle of law can A. be subjected? — But at any rate, special damage is not necessary, when the thing has been delivered

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L^d. Ray. 909. 910. 919-920.—cases cited Jon. 78-85.

If goods are actually delivered to a mandatary, to carry &c, & he (84.)
fails to carry &c, action lies for the failure, on the agreement,
tho' there is no special damage; a fortiori, if there is special
damage.

Said that negligence, not the assumpt., is the cause of action
1 Rol. 10. cited Jon. 80. — 2 L^d. Ray. 910. 919. 5 T.R. 140. 149-50.
3 East, 92. Ex. Where he expressly undertakes to assume all
risks (p. 13. 81.). But if the promise, as such, does not bind, how
is there any duty created, of which neglect is predicable?

Further rules applying to different kinds of bailment.

1. As to bailee's lien, & right to detain. — A lien, properly
so called, exists in bailee's favour, I apprehend, only in the 4.
& 5th kinds of bailment: It being a direct claim to, or incum- (85)
brance upon, some specific property of another, by way of se-
curity for a debt or duty, & accompanied with poss^n of the
property. 1 East, 4.

In the 4th kind (viz Farming), a lien is created by the delivery
itself, & by the terms of the contract — without anything ex
post facto; & Farmer has a right to detain, till the debt is
paid. 4 Com. Dig. 258. Cro. J. 244 & Vern. 178. Gal. 532. Esp. 583.
Pre. Ch. 419.

Most bailees of the 5th kind (i.e. where there is a delivery of goods
to be carried &c, for a reward to bailee) have a lien, by a condition

in law, till they are paid (3 Bac. 185. Hob. 42); but some have not. See "Master & Servant 2 3."

(86.) But a third person, who obtains the poss.ⁿ wrongfully from bailee, cannot avail himself of this lien; & in such case bailor may recover of the former, without tendering to bailee. 3 East, 588. 2 T.R. 485. 1 Camp.t. 12 –

A com. carrier has, of course, a lien, i.e. a right to detain, till paid. L.d Ray. 752. 867. 5 Burr. 2820. arg.t (Sow. J. Cont. L.d Ray. 867) 3 Bac. 269. Sal. 654. 2 N.R. 64.

So, (by Holt), if goods are stolen, & delivered by the thief, to a com. carrier; he may detain them agt. even the owner, till paid: for he was obliged to carry them. L.d Ray. 867. (p. 91.)

An innkeeper has also a right to detain the horse of his guest, till paid the expense occasioned by the horse. 3 Bac. 269. L.d Ra. p. 130. 868. Esp. 584. Bull. 45. 3 Bulst. 268.; Rol. R. 449. Sal. 388. 2 Show. 207. 8 Co. 147. 3 Bac. 185.

87. So, tho' left at the inn by a stranger; as in the case of a com. carrier (p. 86.) & for the same reason. 3 Bac. 185. Gelv. 67. 2 Rol. 85. Poph. 128. 179. Esp. 584.

So, he may detain the person of his guest (3 Bac. 185. 2 Rol. 85. Show. 209 till his whole bill is paid. But the horse cannot be detained for the expense of entertaining the guest. 3 Bac. 180. 2 Rol. 85.

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Lien lost by voluntarily letting the horse go out of his poss.n 2 Bl. Esp. 584. Str. 557. – For a lien on personal chattels cannot exist without actual poss.n: (This rule holds of all liens on personal chattels): And here the poss.n is abandoned. 1 Burr. 493-4. 1 East 4. (ante, 85) "Mast & Serv. 24"

So, a tailor, or other mechanic, has a lien upon the materials, which he has wrought. (1 Bac 240. 8 Co. 147. a. Hob. 42. Selw. 67)

Here the "condition is annexed" by the law, "in behalf of trade & commerce". For the tailor is not bound to receive the cloth – But where the tailor is in the habit of trusting an employer, he ought not to detain, without previous notice; for he is otherwise presumed to have acted on the personal credit of the bailor. 1 Bac. 240. 2. Semb. (88.)

An agisting farmer cannot detain the cattle for his pay; because not obliged to receive; & the interest of trade & commerce it is said, does not require that he should have a lien. Esp. 585. 1 Bac. 240. Bull. 45. Cro. Car. 197.

So, captain of a ship has no lien upon her for his wages, stores, &c. Doug. 97. Abbot. 460. 140. Sal. 33. L.d Ray. 632. 378. 12 Mod. 440. 1 Dal. 49. He trusts to the personal credit of the owners.

But the mariners have a lien. Abbot. 459. Str. 937. Doug. 110. 1 Ch. They are supposed to contract on the credit of the ship.

But where there is a special agreement on which the bailee relies, he cannot detain. Expressum facit cessare tacitum.

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The right of lien, as between factor & principal, is to be deemed waived, when the party enters into a special agreement, inconsistent with the existence of the lien, or from which a waiver of it may fairly be inferred. Ex. When he gives credit, by extending the time of payment; - or takes distinct & independent security for the payment: - Or where the factor makes an express stipulation, on receiving the goods, to pay over the proceeds. 1 Mason. 191. 15 Ves. 278. See also, Selw. 67. note a. (Metcalf's Edit.) 6 T. R. 258.

(8 J.) And it has been holden, in the case of a farrier, that a special agreement to pay a sum certain (without more) ousts the right of detainer. Esp. 3 85-6. Say. 224. 5 Bac. 271. Selw. 66. 2 Col. 92. So where there is an express agreement the law does not imply one. Expressum &c. — Qu. 2d. of the case of the farrier. It seems not to be law. See 2 Wheat. Ed. of Selw. 1071 - where it is said the right of detainer is not waived, merely a special agreement for the payment of a fixed sum; - for which is cited Chase vs Westmore 5 T. R. 5 Geo. III. (where the cases contra are overruled); & for which also, is cited the opinion of Gibbs. Ch. J. in Hutton vs Braggs. 2 Marsh. 345. 349.

"Mast & Serv. 23." "Mast & Serv. 38." So, a factor has a lien on the goods in his actual poss. 3 T. R. 119. Com. Dig. Merch. B. Amt. 284. 1 Burr. 494. Esp. 108. 2 Bl. R. 1154. But he cannot pawn them. 5 T. R. 604. Str. 1178. 1 H. Bl. 362. Com. ub. sup.

p. 87. Lien lost by giving up poss. to the owner. 4 Com. 228. 1 Burr. 493-4. 1 East. 4.

But he may sell them. 1 H. Bl. 362. 7 T. R. 359. "Mast & Serv."

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A bailee of the 2 or 3. kind (i.e. a borrower, or hirer) has a right to keep the property for the time stipulated, even agt. bailor — 1 Bac. 240. Gelv. 172. 1 Rol. R. 128. — Ex. A horse hired &c for a journey. — But this is not properly a lien, tho' a special property — not a right to retain by way of security for a debt. (90.) p. 115.

Depositary & mandatary can have no lien — for they have no debt, or claim, agt. bailor.

Rights of strangers, how far affected by Bailment.

If one bails, as his own, the property of another, the bailee, it is said, must redeliver the property to the bailor, according to the terms of the contract: For the bailee cannot judge between the owner & bailor; but ought to perform his contract. 1 Bac. 237. p. 105. 1 Rol. 607. Rol. 606. l. 50. 1 Bac. 242. "Trover &c".

But qu. whether this rule means anything more, than that the bailee will be justified, in delivering back to bailor; i.e. will be discharged, by this act, of the owner's claim? For the reason given for the rule, requires nothing more. It is intended not to confer a right upon the wrongful bailor; but merely for the protection of the honest bailee.

And it is laid down afterwards in Rol (607) that if bailee redelivers the property to bailor, before, or pending, an action agt. him by the owner; this will bar the owner's action &c. 1 Bac. 242. F. N. B. 137. This rule implies that if the property is not thus redelivered, the owner may recover. ((qu. If bailee has before refused to deliver to the owner, on demand? Is he not from that moment guilty of a conversion? p. 105)) (91.) "Trover &c."

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See 2 L.d Ray 867 (cited ante, 86) where the owner brings action agt com. carrier for goods stolen, & delivered to him by the thief. Holden that he might retain agt the owner "for the carriage" — i.e. till paid. (See Esp. 599. 1 Root 58. ante 86. post, 105); which implies a right to redeliver to the owner, & a right, in the latter, to claim a redelivery, on payment of the fare.

(92.) But if the bailee, in a case of this kind, dies, & his executor comes into Poss.n of the property, the executor, it is said, must deliver to the owner, not to bailor: for having gained Poss.n by law, he must deliver to him, who in law, is the owner.* 1 Bac. 237. 1 Rol. 89). Executor not being bound to testator's personal trusts. ((* Is not the distinction rather too artificial? Why may not the executor discharge himself as the testator might?))

As to the rights of bailee's creditors, who levy on the property as his; & of purchasers under him: —

By stat 21. Jac I. if a person bankrupt, has in his "Poss.n, order, & disposition," goods of another, by latter's consent; they are liable for bankrupt's debts. Esp. 506. 1 Ark. 100. 1 Bos & c. 82. Doug. 303. 8 T. R. 82. 1 Ves. 348. 7 T. R. 228. Wats. 130. — Ex.d Goods sold, but left in vendor's Poss.n — he becoming bankrupt. — or bailed to one becoming so. In this case, the vendor is, as between himself & vendee, the latter's bailee.

This stat. relates to Poss.n &c. by persons becoming bankrupt only. 2 N. R. 67 &c.

(93.) This stat. extends as well to goods, not originally belonging to the bankrupt, but bailed to him, (or permitted by the owner to be in his Poss.n), as to such, as were originally his, & have been sold by him, without a transfer of the Poss.n. Comp. 232. 1 Bos. 82. Esp. 509.

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As to goods originally belonging to bankrupt, & by him sold, before bankruptcy, but permitted to remain in his Posst., the rule was as strong, perhaps, in favour of his creditors, before this stat. as now: Void by stat. 13 Eliz., & at com. law, the sale (it is said) would have been fraudulent as agt. the creditors of the bankrupt. Comp. 2 33. 3 Co. 81. 2 T. R. 587. 595. 7 H. 71. ((* See qu. Whether the Posst. is anything more than a badge of fraud. See "Fraud. Convey.s" 49. 3 Conn. R. 431)).

The creditors of the bankrupt bailee, are allowed by the stat. 21. Jac. I. to come upon the goods in his Posst., not strictly on the ground of fraud between bailor & bailee; but by reason of the false credit, derived from the Posst. Esp. 366. 1 Veg. 364 to 368. 370. 372. Posst. of personal chattels being presumptive evidence of ownership; which, in cases within this stat. cannot be rebutted.

Rebutting any presumption of actual fraud is, therefore, of no avail, (94) to bailor, under this stat. 1 Atk. 180. 183. 1 Veg. 365.

The stat. seems to be founded upon, & in affirmance of, the general principle of the com. law, that when one of two innocent persons must suffer by the act of a third, he who enabled the third person to occasion the loss, must bear it, rather than the other. 2 T. R. 70.

The stat. extends not to goods, possessed by the bankrupt en autre droit: Ex. as executor, or guardian, or as husband in case of wife's separate property. 1 Bail. N. S. 192. 202. 1 Atk. 189. 3 P. W. 187. n. 37. R. 618. — Their Posst. cannot be prevented, by the parties who have the beneficial interest. †next p.

It extends, however, as well to mortgages of goods, as to absolute sales, when the vendor is left in poss^{n} &c, & becomes bankrupt. Last p. Rob. 549. 557. 1 Atk. 165. 1 Veg. 348. 1 Wils. 250. Esp. 506. 1 Law. N. P. 189. 190. vid. 1 Ves. 244. Selw. 226 —— Secus as to mortgages of land. Poss^{n} in this case, is no evidence of title. It can be ascertained by the title deeds.

(25.) Suppose the condition to be precedent to the vendee's right of poss^{n} Will it be within the stat. ? Qu. — I should think not. Rob. 561. 2 T. R. 394. n. For the purchaser does not voluntarily entrust to vendor, property of which he has the right of poss^{n} 1 Ves. 365. 369.

This stat. does not extend to the sale of a ship at sea &c. 1 Atk. 166. Rob. 549-557. Esp. 556. 1 Ves. 354. argt. 361-2. 3 T. R. 462. 1 Law. N. P. 197 &c. For immediate poss^{n} cannot be taken by vendee. But the purchaser must take poss^{n} of the ship as soon as possible, (Esp. 557. 1 Ves. 352. 2 T. R. 402. 485. 491. 4 Maule & Sel. 240); or she will be liable for vendor's debts, in case of his bankruptcy.

So, in many other cases, an actual delivery of the goods is not necessary, under special circumstances. — Ex. Delivering the p. 104. key of a store containing the goods sold, is sufficient. 7 T. R. 71. 2 Str. 935. Esp. 577.

(26.) The goods must be possessed by the bankrupt, as his own p. 100. goods are; or, in other words, they must, with the owner's consent, be left in his "poss^{n} order & disposition"; or the case is not within the stat. Esp. 567. 570. Comp. 238. 1 Atk. 165. 3 T. R. 316. Watts. 130. 1 Ves. 262. — Ex. a store of goods, in his poss^{n} managed & treated as his own.

Bailment –

Secus. of a horse, let or lent to him for a journey. Here there is no sufficient evidence of ownership; & therefore, no false credit given.

Therefore, a temporary Poss.n for a particular purpose, (as till an opportunity shoulds offer of sending the goods to vendee), is not within the stat. Esp. 507. 1 Atk. 185. 1 Lan. N. P. 197. 200.

So, the bankrupt must appear, in all respects, to be the owner, to bring the case within the stat. For if, from the known nature of his business, the presumption of his ownership is excluded, the true owner shall hold. Esp. 570. 1 Bos & P. 82. 1 P. W. 318. 3 P. W. 185. – As in the case of factors, & goldsmiths*, who do not deal in their own goods. (*Goldsmiths – i. e. Private bankers)

In common cases of bailment, (as where bailee is not in the "order & disposition" of the goods, & is not, of course, the ostensible owner – or where he does not become a bankrupt), the stat. does not apply. The general rule is, in such cases, that the true owner, i.e. bailor, may recover agt any creditor, who levies upon them, as being the bailees: So, also agt any purchaser under bailee, or any subsequent purchaser, unless the sale was in market overt. – So, agt any person, into whose hands they may otherwise have fallen, however honestly he may have obtained them. Caveat emptor. Esp. 579. 1 Wils. 8. 2 Str. 1187. 3 Atk. 64. Sal. 283. 5 Bac. 260. 266. 268. see "Trover". Ex. Horse let, & sold by bailee – Bag of jewels deposited – This is the rule of the com. law. (97.)

This rule, it seems, in the extent to which it is carried, is found inconvenient in Engl. 2 T. R. 370. 4 T. R. 640. (98.)

Bailment.

It has been several times suggested that poss. 9ms. of chattels, ought, as to third persons, who trust to it, to be conclusive evidence of ownership. ((*Long, a permanent poss.? — or, such, as gives an appearance of ownership, I suppose.))

Exception to the last general rule, where the property bailed is money, or bank-bills, or bills of exchange, transferable by delivery. Here, a regular transfer by bailee to a bona fide receiver, tho' not in market overt, binds the property. Esp. 39. 579-80. Cal. 120. 1 Burr. 482. 485. 3 Burr. 1516. 1 Bl. R. 485. — A rule of commercial policy: This property being used as currency. Otherwise, trade embarrassed — no one safe in common dealings. "Rover. 62."

We have no such stat. as that of 21 Jac. I.; but the general principles, adopted here, relative to bailments to persons insolvent, or becoming so, are, in a great measure, conformable to the reason & spirit of that stat. (P. 97.)

(99.) To bring a case within the stat., or the principle, on which it is founded, two requisites must concur: 1. The person in poss. must be, or become, insolvent. — 2. He must be, with the owner's consent, in the "order & disposition" (as well as poss.) of the goods; — i.e. he must with the owner's consent, have the appearance of actual ownership.

II. A creditor, then, of bailee, who seizes the property, as bailee's, or a purchaser under him, cannot hold ag.t bailor in any case, (however strong bailee's appearance of ownership may have been) unless the bailee is bankrupt. For if bailee is solvent, the purchaser under him has his remedy on the implied warranty; & the creditor may have his satisfaction out of other property. Same rule in Conn.t where there is no insolvency.

III. And even when bailee is bankrupt, his creditor, or a purchaser (100)
under him, will not hold, unless his Posp: was, with bailor's consent,
such as to give him a false credit, or the appearance of actual own-
ership. (1 Bos. & P. 82. 88. 648. Doug. 305. Rob. 533-4. n. Cook. B.L. 234.
7 T.R. 67. 237.) - i.e. unless, (as in the words of the stat. 21 Jac I.), he
is by the owners consent, in the "order & disposition" as well as Posp:
of the property. Rob. 530. 1 Ves. 243. 1 Atk. 185. — In other words;
unless, by the terms of the bailment, he possesses the property, as he
possesses his own. For otherwise, he is not in the "order & disposi-
tion" of it, with the consent of the owner. Ex. An assortment
of goods belonging to A. but committed to the Posp: & disposition
of B. to sell, & manage at pleasure, as the ostensible owner.
B's creditor will hold. 1 Atk. 185. Doug. 305. : He being (insol-
vent) bankrupt.

Hence, in the case, where jewels were pawned in a sealed bag
to a broker (1 Atk. 185. 3 Atk. 44); which he broke, & pawned with
the contents, by a breach of trust — bailor recovered.

So, if one lets or lends a horse or carriage to another for a short
period, or a journey.

If a box of goods is left with bailee to keep, merely, they can- (101)
not be in "his order" &c, without a violation of the terms of the bail-
ment; they are not so, with the owners consent. Therefore a
purchaser under the bailee cannot hold them (3 Atk. 44); nor
may his creditor seize them on execution.

So, if the goods are left by a purchaser only in the temporary
Posp: of vendor, for a particular, reasonable, & necessary, pur-
pose; they are not in his "order" &c, with vendees consent. (Brown
vs Sanderson, N. L. C. 10. Doug. 603. 1 Atk. 185-7. Esp. 507. — Ex-
(over)

From such a state of weather or roads, as prevents their immediate removal.

So, if a purchaser of goods leaves them with vendor, till a conveyance can be found; & vendor in the meantime becomes bankrupt.

(102.) So, where cattle were sold by driver, in Comm^t. – sale adjudged not good. Evidence of ownership was not sufficient; not in the "order" of sale with owner's consent.

If goods are bailed for hire, to be used by bailee, for a certain time, can bailee's creditors take the use of them, for the term of the bailment, in execution? 7 T.R. 11. 12. I think not. see. 2 Bac. 352. Ay. 67. b. Com. Dig. Ex^n. C. 4. 1 Bac. 233. 1 Mod. 210. Sal. 404. 6 Mod. 223. 11 Ed. 7. L^d Ray. 795. 913. 915–16. It is a personal trust, not transferable by bailee. 5 T.R. 684. 7 East, 6. (See ante case of Farr, which cannot be taken in execution for Farmer's debt). The doctrine of L^d Kenyon in 7 T.R. 11–12. does not seem, when understood secundum subjectam materiam) to impugn this opinion. There the goods are supposed to consist of articles of furniture, belonging to a house, & leased with the house; & as the term might be taken by a creditor, the furniture, being an appendage of it, might be taken with it. It was indeed, parcel of the subject demised.

p. 39. 41.

To what actions bailor & bailee are respectively entitled against strangers, & each other.

(For the residue of this title see Trover & Trespass)

General Rule: The bailor, having the general property, may recover in tresp. trover, or any other action, (according to the nature of the case) agt. any stranger, who takes, or injures the.

Bailment.

goods in bailee's Poss.n 5 Bac. 164 &c. Pl. 9. 10-17. 260, &c. 3 Keen. H.B. L. 392. Latch. 214. 2 Bulstr. 208. 1 Rol. 4. See "Trover, &c."

So, tho' bailor never had the actual Poss.n Ex. Bill of sale of goods not delivered. (5 Bac. ut sup. Latch. 214) — & wrongfully taken, by a stranger, from vendee's Poss.n (103.)

For in personal things, Property generally draws after it a Poss.n in law, or a constructive Poss.n ** 2 Rol. 566. Pl. 5. Sid. 438. — For the owner of goods has the rights of Poss.n of course, (unless it is transferred by his own act, or by act of law), tho' the goods may be in the hands of another. ((** A right of present Poss.n in any one, is a Poss.n in law.))

But if goods are loaned for a given time — or bailed for hire, to be used by bailee for a certain time; bailor cannot maintain treesp. or trover agt. a stranger for taking or injuring them, during that time. 4 T.R. 489. Esp. 383. 7 T.R. 9. 13. Ec. 486. 8 Johns. 432. "Trover &c." For the Plff must have had the actual or constructive Poss.n at the time of the injury done. Esp. 576. 1 Bulst. 68. 4 T.R. 489. vid. 1 Harr. P.C. 130-6, n.* ((* The action of treesp. &c, in such case, must be by bailee: Tho' for a detention, by the wrongdoer, after the term expires, bailor may doubtless sue.)) (104.)

If bailor might maintain the action of treesp. or trover, in such cases it must be by virtue of a right in him to recover for the original immediate injury: But such a right would suppose a right of Poss.n during the term of the bailment — which would be in derogation of the bailee's rights.

But if goods are wrongfully taken from a depositary or mandi-tary, or injured while in his poss^n bailor may, doubtless, maintain tresp. or trover, for the immediate injury: For he has the right of poss^n or a constructive poss^n at the time of the injury done: Since the depositary has no right to hold ag^t him. — Same rule, I trust, in all cases in which the delivery is countermandable. 5 Bac. 164. pl. g. 16. 17. 260. 1 Rol. 4. Latch. 214. 3 Reeve. H. C. L. 392. 2 Bulst. 268. see "Trover 55-" & "Larceny".

And in the former case (p. 103.) bailor may have tresp. on the case ag^t the wrongdoer; (as in the case of real estate). 1 Ch. Pl. 167. 3 Lev. 209. 389. 2 Phill. Ev. 334. 8 Johns. 432. 11 Pet. 383. 2 Ch. Pl. 329. n. — i.e. a special action on the case for the injury to his reversionary interest.

(105) If bailee delivers the goods to a stranger, bailor cannot have tresp. ag^t the latter, nor, (in the first instance) trover: For the stranger obtains poss^n lawfully. (This rule must relate to a bona delivery for some lawful & honest purpose — not violating or interfering with bailor's rights: For if it does, the delivery is a breach of trust, & void, as ag^t bailor. p. 38-g. 89. 117.) 5 Bac. 164. pl. 18. 261. pl. 19. 1 Rol. 6 56-7. 1 Bac. 237. "Mast. & Serv^t. 24"

p. 117. But on demand & refusal, (bailor exhibiting sufficient evidence of ownership) he may have trover ag^t the stranger. Tho' the stranger may discharge himself (semb.) by redelivering to bailee p. 90-1. before or during the action* 1 Bac. 242. bis. H. N. P. 137. 1 Rol. 607. p. 86. Ld. Ray. 807. Root. 58. [* Sed qu. — p. 90-1.]

(106.) So, too, most bailees, & I conceive, all, (sed vid. 5 Bac. 165. pl. 22. p. 1. 262. pl. 30-1.) may maintain an action for the full value, ag^t a "Trover. 58" wrongdoer. Ex. a com. carrier — a special carrier — an agister &c.

Bailment —

5 Bac. 105. 262. L.d Ray. 270. Bull. 33. Hely. 39. Esp. 577. Mod. 31. No. 545. Sal. 143.

A finder of goods may also recover agt a stranger who takes them away, or injures them, while in his poss.n Etr. 505. 1 Bac. "Trover." 348. Bull. N.P. 33. Esp. Dig. 575. 577. "C. 2. 107.

The ground of bailee's right to sue, as above, is said to be his own liability to bailor. 5 Bac. 104-5. 262. pl. 21. 30. Y. N. B. 89. 92. Co. L. 89. Sid. 438. 13 Co. 69.

And, therefore, it has been doubted, whether a depositary can have an action agt a wrongdoer, under a general acceptance, or an acceptance to keep as his own; because he is not liable in these except for fraud. 5 Bac. 105. pl. 22. 262. pl. 30-1. "Trover 58"

But Qu. whether there is any ground for this doubt. For every bailee has a special property in the thing: Jon. 112. 7 J. R. 392. pl. 1. 398. 1 Bac. 240. And this is sufficient to give a right of action agt a stranger. 1 Bac. 340. 7 J. R. 396-7-8. Esp. 577. 5 Bac. 262. pl. 32. (107.) — Etr. 505. Esp. 575, that a finder has such a property as will enable him to "keep the thing agt all but the rightful owner, & "consequently may maintain trover." S. C. 5 Bac. 262. (ante 105.) So, (Comb. 204) it is holden that "poss.n gives an interest & property." "Trover, 58" — Hence, a servant robbed may sue the hundred, on the stat. of Winton. 4 Mod. 404. Com. 267. Comb. 203. 12 Mod. 54. "Mast.r & Serv.t 31" — But he is not liable over to his master. "Trover 59" So, a servant may have an appeal of robbery, when robbed of his master's goods. 13 Co. 69. Yet he is not liable to his master in case of robbery. Jon. 129-30. 138. 2 Saund. 380. (108.)

"Trover. 88." Indeed, it is a well settled principle, that a special property is sufficient as agt a wrongdoer. Bull. N. P. 33. 5 D. Esp. 575. 577. 7 T. R. 398-8. Etc. 308. &c. If a house is blown down; lessee for life may have trover agt a stranger, who takes away the
Trover 58. timber, because of his special property. Bull. 33. see 5 Bac. 165. 262. And yet he is clearly not liable over to the reversioner.

"Trover. 57." So, an uncertificated bankrupt, (Bos, &c. 44. see Doug 455) having acquired goods after bankruptcy, may have trover agt a stranger.
p. 110. Indeed, a mere lawful poss. is sufficient for this purpose. 7 T. R. 397.

It seems clear, then, that the bailees liability to the bailor, is not the ground of his right of action agt a wrongdoer.

(109.) Indeed, as agt a wrongdoer, he may, with strict propriety, be considered, as the owner.

Besides, depositary may by possibility be liable; i.e. he is accountable, & may be actually liable for the property. This seems sufficient, on the principle that the ground of bailees right to sue, is his own liability. And tho' his liability to bailor supposes gross neglect, a bad faith; yet this can furnish no excuse for the wrongdoer. For no bailee (except com. carrier & innkeeper) is liable to bailor, but in consequence of his own fault.

Further: No bailee is liable in all events. And how shall it be determined before hand, in any case, that there is actual liability? The principle that bailee cannot maintain the action unless he is liable, would be equally an objection to any bailees right to sue, unless the question of his actual liability were tried in the action by the bailee agt the wrongdoer; But must be clearly improper, & impossible: Besides, the decision would not bind the bailor; nor

even the bailee, in an action by bailor.

If, then, a bailee's possible liability were the real ground of his right to sue a stranger; a depositary would have the right, as well as any other bailee —

Besides: Policy requires that depositary should have this right. (110.) Bailor may be at a distance, or not in a condition to sue, immediately; & speedy remedy necessary.

If bailee delivers the goods to a stranger; the latter may have an action agt. any third person who violates his Possn. semb. 5 Bac. 260. 1 St. 242. bot. Rol. 507. For he has a special property, & is liable, it is said, to both bailor & bailee: i. e. he is accountable to them, & may be actually liable for the property. But his special property, or lawful Possn. is sufficient as agt. a stranger (3. 108.)

An auctioneer or broker may maintain an action in his own name, on contract for goods sold, agt. the buyer; tho' the goods were known to belong to another. 1 H. Bl. 81. 2 St. 591-2. 1 Chit. Pl. 5. (111.) "Mast & Serv. 25" For he has a beneficial interest — viz. a commission; & sells in his own name.

A fortiori, a factor may have such an action. 1 H. Bl. 82. agt. "Mast & Serv. 25" Bull. 130. Park. Ins. 463. So also may the captain of a ship, for freight. (Ibidem.)

When bailor & bailee have both a right to sue, there can be but one recovery, for the full value: Therefore, a recovery by one, in treesp. or trover, bars the other's action for the full value. 13 Co. 69. 5 Bac. 165. pl. 34. 263. pl. 33.

And in 2 Rol. 559. it is said, if both one, he who first recovers shall oust the other. 8 Vin. 22.

(112.) But does not he who first commences suit, acquire the prior right of recovery? i.e.: Does not the first commencing of an action for the full value by one, (if it is proceeded with) oust the other of his action of the same nature? A right of recovery being attached by commencing the suit? This is analogous to the case of an appeal of robbery, by master or servant. "He that begins first shall prevent the other of his action." 3 Bac. 359. Mast. & Serv. 31. Latch. 127. by Doddrige. J.

(113.) If the bailor has recovered satisfaction of the wrongdoer, he cannot maintain an action agt. bailee: For he can have but one satisfaction. 5 Bac. 280. L. Ray. 1217. Cro. Car. 24. 35. 3 Lev. 124. Esp. 319. Sal. 11. Yelv. 68.

So, I conceive, if bailor first commences his action agt. the wrongdoer, bailee is discharged. Bailor thus waives his action agt. bailee. (I find no authority in point: But, if it is true, that bailor, by commencing suit agt. the wrongdoer, ousts bailee of his action for the same cause; the rule must be as on principle. "Hover. 59".)

The case is analogous to that of rescue & escape, in which, if the Bliff proceeds agt. the rescuers &c, the Bliff is discharged. (Semb.) Esp. 510. 512. Cro. Car. 109 & 77. Hutt. 98. — Sed qu.

(114) On the other hand, if bailee sues first, for the full value, he makes himself liable, at all events, to bailor. Semb — This must, doubtless, be the case, if the bailee, by first commencing his action,

for the full value, ousts the bailor of his. "Trover. 59."

But bailee may have an action for his special damage (if any), even tho' bailor has recovered the full value. According to the general rule, that damnum cum injuria, gives an action; 3 T. R. 65.

If bailor himself takes the property from bailee, before bailees special property is determined; the latter may have a special action on the case, agt. the former; not trover, nor trespass, as I should think, on principle. 1 Bac. 240. Velv. 172. 1 Rol. R. 128. 5 Bac. 185. Fl. 8. 265. See Esp. 401. (13 Co. 69. con) — For these actions are for the full value of the goods. See "Trover" — His special property is the ground of his right of action. But this special property gives a right to these actions (i.e. for the full value) only agt. strangers, I conceive. Str. 505. Esp. 375. As agt. them, he may, indeed, properly be considered as the owner. But, as between bailor & bailee, the thing bailed is not bailee's: He has only a special property, entitling him to the custody & use. 1 Ves. 359. 361. (115.) (116.)

According to 13 Co. 69, however, trespass, or trover, will lie; & the bailor's ownership shall mitigate damage. But, I conceive, that in all cases when damage is merely mitigated, when the full value is sued for, (as by returning the property before suit, in case of trover), the Plff has originally, at least, prima facie, a right of action to recover the whole. But the bailee, as agt. the bailor, has prima facie no such right. "Trover. 60."

But suppose the special damage greater than the amount of the property; the damages cannot be increased or aggravated.

(117.) A strong objection to the rule in 13 Co. 69. is, that, in an action by bailee agt. bailor, the value of the property is no rule of damages, for the actual injury sustained: Tresp. or trover, which are brought for the value of the property, seems, therefore, not adapted to the case

If bailee delivers the property to another, contrary to the bailor's orders; he (the bailee,) is guilty of a conversion. Esp. 581. 4 T. R. 260. & trover lies agt. him without demand. (P. 105.)

Generally, bailor can maintain no other action agt. bailee than detinue, or an action on the case; as a special action on the case for negligence; trover for conversion; or assumpsit, on the promise express, or implied, to redeliver. 1 Bac. 237-8. 4 Com. 258. Bull. 72. Cro. J. 244. Cro. E. 781.

When bailor is injured by bailee's negligence, he may declare in assumpt. on the agreement, or in tort. Semb. 3 East, 62. 1 Wils. 282. 2 Dt. 319.

Tresp. will not generally lie, because the original Posp. is lawful. 8 Co. 140. Perk. Sec. 191.

Secus, if bailee destroys the goods; here the bailment is ex-
P. 68. tinguished. Co. L. 57. a. 8 Co. 13. b. 3 Com. 581. Mo. 248. 2 Rol. 556. 2 T. R. 406. — See 3 Atk. 40. (3 Bac. 200. cont.)

Of Inns & Innkeepers.

(123.)

At com. law, any person may lawfully exercise the employment of an innkeeper, unless it be inconvenient to the public: Inns being established without license. 3 Bac. 178-9. 2 Str. 1116. 1 Rol. 84. Cro. Jac. 594. Palm. 374. And he who assumes the character, becomes liable to the duties of an innkeeper. p. 129.

But inns, from their number, may become common nuisances, & the keepers of them may be indicted, at com. law, as for public nuisances. 3 Bac. 179. 4 Bl. 168. Cro. Car. 549. 2 Hale. 174.

Inns, being disorderly, also become public nuisances, at com. law. (124.)
3 Bac. 179. 4 Bl. 168. 1 Hawk. 198. 225.

But alehouses in Engd are required to be licensed, by stat. 5 & 6 Edw. VI.
3 Bac. 179. Hutt. 99. Cal. 45.

In Connt no inn can lawfully be established, unless licensed according to the stat. License is obtained for one year, from C. & C., upon the recommendation of the civil authority, &c. Stat. C. 640. — Similar provisions in other states.

Keeping an inn without license, is punishable by fine, doubling for every new offense. St. C. 646.

For disobedience to the laws respecting innkeepers, any one's license (125.)
may be suspended by civil authority & selectmen, till the next Cty Ct.;
& the Cty Ct. may continue or remove the suspension. St. C. 643.

But this provision cannot, I conclude, oust the com. law proceeding by indictment agt keepers of disorderly houses.

Inns & Innkeepers—

Duties of Innkeepers.

Their duties extend chiefly, only to the entertaining of travellers, & the keeping of their goods. 3 Bac. 180-1. 9 Co. 87.

(120.) If an innkeeper refuses, without sufficient cause, to entertain a traveller, upon a reasonable price tendered, he is liable, not only to an action on the case, but to an indictment also. 3 Bac. 181. 4 Bl. 168. 1 Hawk. 225.

His care does not extend to the person of the guest, but to his effects only. If a guest is beaten at the inn, by another, the innkeeper is not liable. 3 Bac. 181. 8 Co. 32.

If he, or his servant, sells to a guest unhealthful food or liquor; he is liable in case. 3 Bac. 182. 1 Rol. 95.

(Principal rules as to his liability for goods lost, &c, under "Bailment" Bailment. 68-73. Master & Servant. 32-3.)

(127) p. 73. If a guest's horse is put to pasture, by his own order; still the innkeeper is liable, if lost by his actual negligence; - as if he leaves open the gate of the close &c. 3 Bac. 181. 1 Rol. 4.

Not discharged of his liability for the guest's goods, by absence, sickness, or even insanity. 3 Bac. 182. Cro. El. 622. This strictness is founded in reasons of policy - to guard guests agt the negligence & fraud of innkeepers.

But an infant innkeeper is not chargeable, as such. This privilege is preferred to the custom. 1 Rol. 2. 3 Bac. 182.

Inns & Innkeepers—

If innkeeper refuses to receive a guest, because his house is full, & the guest still persists in staying, & taking his chance; the innkeeper is not liable for his goods. 3 Bac. 183. Dy. 158.
(* Note the analogy to the case of com. carrier, p. 59.)

If the host requires the guest to lock his apartment, & refuses (128.)
to be otherwise answerable, & the guest neglects; 2n. Is the host liable? The opinions are contradictory. 3 Bac. 183. Dy. 266. Mo. 78. 158. vid. 4 Maule & Sel. 306. — I should think it unreasonable to subject him.

At any rate, merely delivering the key of an apartment to the guest does not discharge the host, tho' the goods are lost by the doors being left open. 3 Bac. 183. 8 Co. 33. a.

The host is liable, tho' he does not know the kind or value of the goods. 2n. How is it if the guest deceives him? 3 Bac. 183. 8 Co. 33. a. Mo. 158. 5 T. R. 273. (p. 60.)

His liability is only in favour of travellers, & such as board at his (129.)
inn, at the price charged to travellers. It does not extend to neighbours who lodge at his house, or boarders at the common prices, given at private houses. These he does not receive in the character of innkeeper. 3 Bac. 183. 8 Co. 32. b. 1 Rol. 3. Skin. 270. And the policy of the law does not extend his liability to such cases.

An Inn, is a house, the owner of which holds out, that he will p. 123.
receive all travellers & sojourners, who are willing to pay a price p. 68.
adequate to the sort of entertainment provided, & who come in a situation, in which they are fit to be received. 3 B. & A. 283.

Inns & Innkeepers—

He is not chargeable in the owner's absence, for any goods, for keeping which he receives no profit—i.e. if the owner's absence is such, that he is not considered a guest, the host is not chargable as innkeeper. But while the owner is a guest, the innkeeper is chargeable for all his goods, which are infra hospitium. 3 Bac. 183. 1 Rol. 3. 338. Cro. Jac. 188. 5 J. R. 273. Noy. 126. No. 877. Bl. 179.

(130.) And for goods, for keeping which he does receive a profit, he is liable tho' the owner has left the inn, & is not a guest. Cro. Jac. 188. 3 Bac. 184. 1 Rol. 3. No. 877. Noy. 126. Cal. 388.

If a servant is robbed of his masters goods, at an inn, the master may sue the host. 3 Bac. 184. Cro. Jac. 224. Velv. 102. Sy. 158. 5 J. R. 273.

Innkeepers remedy against Guests.

[p. 88-7.] He may detain the guest, till paid his bill. 3 Bac. 185-6. Cal. 388. Carth. 150. — Or the guests horse for the expense of his keeping [p. 88-7]

And may retake either on fresh suit. 3 Bac. 185. 2 Rol. R. 438.

But he may not use the horse detained. For it is in custody of the Law, like a distress. 3 Bac. 185. No. 877. Str. 550.

A promise by a stranger, to pay, if the host will release the horse, is good. Hutt. 101. 3 Bac. 185. 1 Wils. 305. 3 Burr. 1885.

March. 14th 1828. Geo. Gould.